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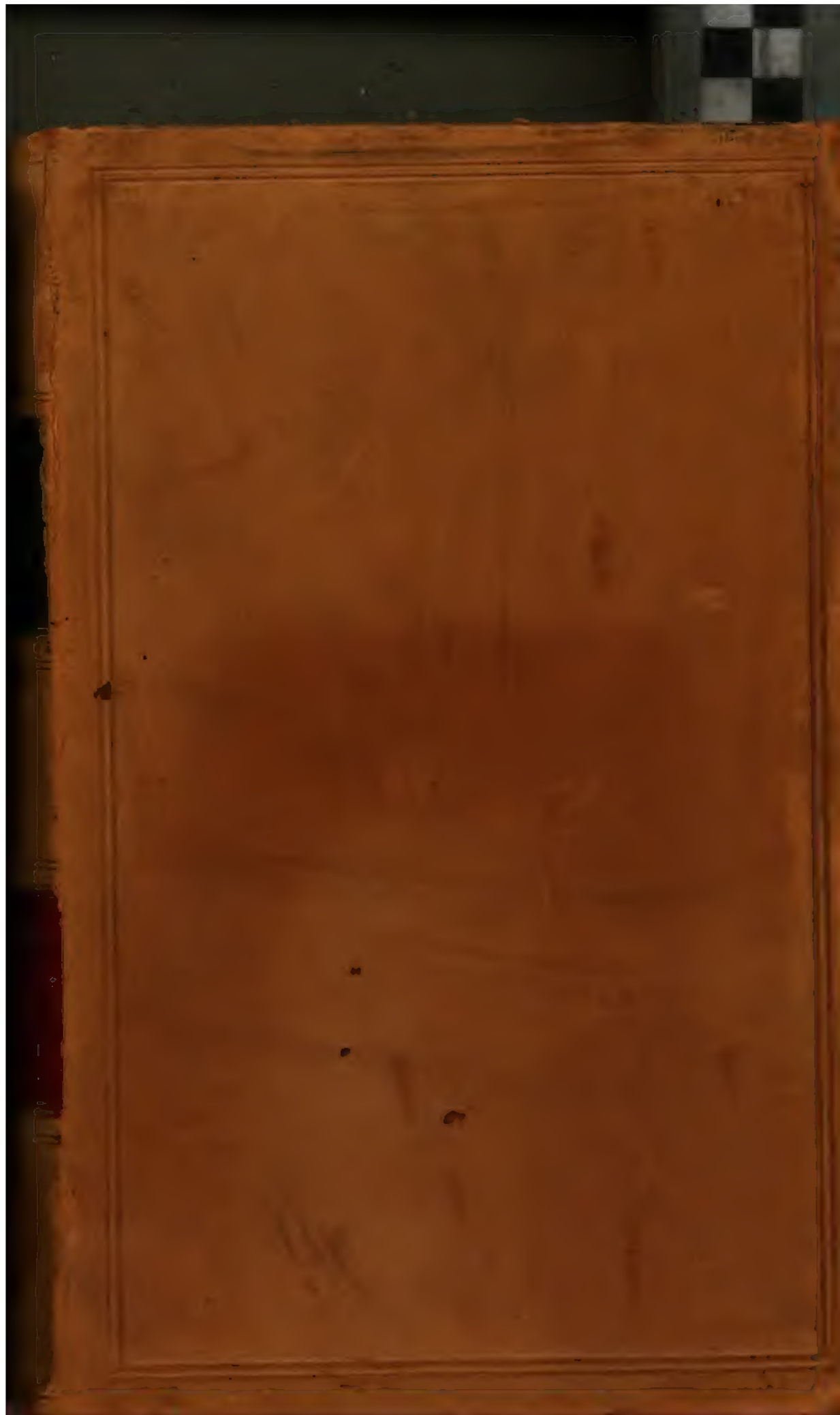
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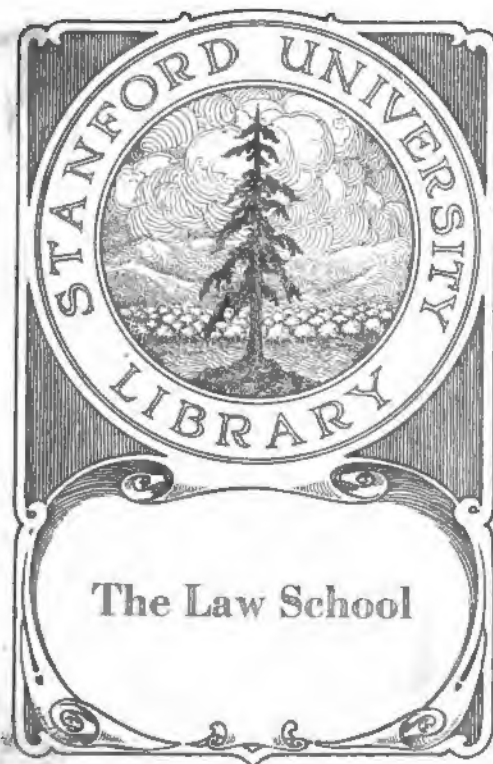
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AMERICAN
RAILROAD AND CORPORATION
REPORTS.

**BEING A COLLECTION OF THE CURRENT DECISIONS OF THE
COURTS OF LAST RESORT IN THE UNITED STATES PER-
TAINING TO THE LAW OF RAILROADS, PRIVATE AND
MUNICIPAL CORPORATIONS, INCLUDING THE
LAW OF INSURANCE, BANKING, CARRIERS,
TELEGRAPH AND TELEPHONE COM-
PANIES, BUILDING AND LOAN
ASSOCIATIONS, ETC., ETC.**

EDITED AND ANNOTATED BY
JOHN LEWIS,

AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."

VOLUME X.

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P R E F A C E .

As the publishers of this series of reports have announced that subscriptions may begin and end with any volume, it seems proper that each volume should contain some prefatory explanation of the scheme and plan of the series. Two volumes will be published annually, containing in full the most important decisions of the year pertaining to railroads and corporations and the kindred subjects named on the title page. All cases not published in full will be embodied in the notes and made available by means of the index at the end of each volume. Each of the published cases will be annotated, and the aim of the Editor will be, first, to give prominence to the new questions which have arisen in the last few years touching railroads and corporations, among which may be mentioned, Trusts, Combinations and Pools, Interstate Commerce and the Interstate Commerce Law, State Control and Regulation of Railroads and Corporations, Strikes and Boycotts as affecting Railroads, Limitations of Liability by Common Carriers and Telegraph Companies, Discrimination by Railroads, and the various questions arising out of the modern applications of electricity. Monographic notes will be written upon the general questions pertaining to railroads and corporations, as space and opportunity permit, which will be made, as far as possible, exhaustive in treatment and citation, until the whole scope of railroad and corporation law has been covered. The series will then become a complete text book upon these subjects, with all the leading cases in full, and, unlike a text book, it will be continually up to date. Every sixth volume will contain a general index to the last six volumes published, whereby the decisions of three years, together

with all the notes for the same period, will be made available under one alphabet.

At the end of each published opinion reference is made in a foot note to the Reporter System where the case may be found and also to the official report, when possible. In the citation of current decisions in the notes reference is made to both the Reporter System and to the official reports, which, we think, will be found a decided advantage over a reference to either, alone. In this connection we acknowledge our obligation to the West Publishing Company for their courtesy in permitting us to make use of the matter contained in their various reporters in the preparation of these volumes.

THE EDITOR.

CHICAGO, *April*, 1895.

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AMERICAN RAILROAD AND CORPORATION REPORTS.

METROPOLITAN WEST SIDE EL. RY. CO. v. STICKNEY ET AL.

(Supreme Court of Illinois, June 16, 1894.)

1. **EMINENT DOMAIN. WHAT CONSTITUTES DAMAGE TO PROPERTY NOT TAKEN BY CONSTRUCTION OF ELEVATED RAILROAD.** Where part of a lot or tract of land is taken for an elevated railroad, the remainder is not damaged within the meaning of the law unless its value is diminished by reason of the taking, and the amount of compensation required to be made is measured by the amount of depreciation or diminution in value occasioned by the construction and operation of the road.

2. **WHAT ARE SPECIAL BENEFITS TO PART NOT TAKEN.** Special benefits are such as are not shared in by the community at large; if property is enhanced in value by reason of a railroad or other improvement, it is specially benefited, although property generally along the line, or in the vicinity, of the improvement may be similarly affected.

3. **ELEMENTS TO BE CONSIDERED IN ESTIMATING DAMAGES AND BENEFITS.** Every element arising from the construction and operation of the railroad or other public improvement, which, in an appreciable degree, is capable of ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particular property, is properly to be taken into consideration in determining whether there has been damage and the extent of it; on the other hand, a consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which can be no other than conjectural or speculative, should be excluded.

CONDEMNATION suit by the Metropolitan West Side Elevated Railway Company against Joseph A. Stickney, the Grant Manufacturing Company and William Ilett. There was judgment of condemnation and award of compensation. Plaintiff appeals.

E. J. Harkness (*W. W. Gurley, general counsel*), for appellant. *Elbert H. Gary*, for all of appellees. *C. M. Walker*, for appellee Stickney. *Geo. W. Sanford*, for appellee Ilett. *T. H. Simmons*, for appellee Grant Manufacturing Company.

PER CURIAM. This was a proceeding instituted by the Metropolitan West Side Elevated Railway Company for condemnation of right of way across certain lots in the city of Chicago, owned by appellees in severalty, the Grant Manufacturing Company, appellee, having a leasehold interest in the property owned by appellee Stickney. A trial resulted in a verdict and judgment for damages to land taken, and for damages for the removal of buildings, and to the parts of the lots not taken, in severalty. Thus there is awarded the owners of the leasehold interest in lots 24, and the south six feet of lot 25, in Campbell's subdivision, etc., and "for costs of removal from said premises, and for damages by the interruption to the business, and for the value of the improvements in said premises, and for damages to the leasehold interest in the remainder of said premises not taken, to wit, the south 125 feet of lots 21, 22, 23, 24, 25 and 26 in said subdivision, the total sum of \$5,150;" and to the owner of the reversion, appellee Joseph A. Stickney, for his reversionary interest in the land taken, and for damages to the reversion in the south 125 feet of lots 21, 22, 23, 24, 25 and 26 in said subdivision, except lot 24 and the south six feet of lot 25, and in full for damages to lots 19 and 20, and to that portion of lot 26 not included in said leasehold interest, and to lots 27 and 32, both inclusive, all in said subdivision, the gross sum of \$15,983; and to the owner (appellee William Ilett) of the south thirty feet of the north sixty-seven feet of lots 1, 2 and 3 in block 2, Reed's subdivision, etc., as compensation for land taken and for damages to the remaining portion of said premises, to wit, said lots 1, 2 and 3, the gross sum of \$16,465. Numerous errors are assigned, but we shall find it necessary to consider only those questioning the correctness of the ruling of the court in giving and refusing instructions. No question is raised as to the correctness of the ruling of the court that as to the land taken for the proposed public improvement, the owner was entitled to recover its full value for the purpose to which it was devoted or of which it was suscep-

tible. The questions that we shall consider relate solely to the compensation to be awarded for damages to the part of the land or lots not taken.

By the eleventh and twelfth instructions given for respondents the jury were told: "(11) The jury are instructed that if they find from the evidence that any of the respondents' property which is not taken will be damaged by reason of taking a part of their property, and by the construction, maintenance and operation of the railroad, then the jury have no right to offset against such damages any benefits which may arise from the construction and operation of such railroad, unless the jury find from the evidence that such benefits are special to respondents' property, and not shared by it in common with the generality of property in the vicinity of the line of said proposed railroad. Under the laws of this state, no benefits or advantages which may accrue to the property not taken, in common with all other property along or near, or in the vicinity of the line of the proposed railroad, by reason of the construction and operation of said railroad, can be lawfully set off or deducted from the damages, if any, to the property not taken. (12) Even though the jury may believe from the evidence that some of the property of some of the respondents will be actually benefited by reason of the construction and operation of the petitioner's railroad, yet if the jury further believe from the evidence that such benefits are not special to the respondents' property, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be considered in determining whether or not the property of said respondents, not taken, will be damaged by reason of taking a part of their property, and operating, constructing and maintaining the petitioner's railroad." And the same was again said to the jury in the fourteenth, fifteenth, sixteenth and twenty-first instructions given on their behalf. The giving of these several instructions is assigned for error.

The misapprehension of counsel in drawing, and the court in giving, the instructions, consists in that they fail to draw the distinction between benefits that are special to the property not taken and those by which it is specially benefited. Property may be specially benefited by an improvement, and at the same time

other property upon the same improvement be likewise specially benefited. This may be illustrated by the assessing of special benefits for a local improvement. Presumably, all the property along the line of the improvement will be more or less specially benefited; that is, benefited beyond the general benefit supposed to diffuse itself from the improvement throughout the municipality ordering the improvement made. If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to the whole community at large, it is said to be specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement, to a greater or less degree, may be likewise specially benefited. *Wilson v. Board*, 133 Ill. 443; 27 N. E. Rep. 203. In other words, it is not such benefit as is special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but is such benefit as that the particular property is, by the improvement, enhanced in value; that is, specially benefited. Hence, the language of the twelfth instruction: "Yet, if the jury further believe from the evidence that such benefits are not special to the respondents' property, and are shared by it in common with the generality of property in the vicinity of the line of said proposed railroad, then such benefits are not to be considered," etc., does not announce the correct rule of law. So, in the use of the words, "and shared by it in common with the generality of the property," etc., there seems to be a confusion of ideas. If a piece of property is enhanced in value, such enhancement — or, in other words, benefit — to the property cannot be said to be common to any other piece of property. Each piece of property specially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows necessarily that where the benefits are designated as "general benefits," "benefits common to other property," and the like expressions, to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits upon properties near it, by an increase in their value, and, at the same time, by the conveni-

ence afforded the general public, confer a general benefit. So, a railroad built through a town or through the country may be a general benefit, by affording additional facilities for travel and commerce, and thereby be a benefit to the community at large. But the effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative ; and it has always been held that such benefits are not to be considered for that reason. Keeping these distinctions in view in the further discussion, it will be found that the numerous cases in this state, perhaps, with a single exception, are in line.

While there is, perhaps, some confusion in the cases, it will be found that the measure of damages adopted in this state, as well as by the weight of authority elsewhere, is the difference in value in property before the proposed construction and what it will be afterwards. Hence, the effects flowing from the proposed work upon the particular property are to be considered ; and if the value of the land not taken, considered as a part of the whole tract or separately, is equal to its value before the improvement, there is no damage to property not taken. This will become apparent by a slight review of the laws, as announced in the various cases.

Under the Eminent Domain Law of 1845 damages were not allowable where an additional value was given to the land from the proposed improvement, equal to the injury occasioned. In other words, the general benefit to the owner's property was allowed to be set off against the damages to his property by reason of the taking a part thereof for the proposed improvement. Or, differently stated, in determining whether he was damaged, and the extent thereof, the general benefits to his property were to be considered. *Railroad Co. v. Carpenter*, 14 Ill. 190 ; *Hayes v. Railroad Co.*, 54 Ill. 373 ; *Railroad Co. v. Laurie*, 63 Ill. 264. The act of 1852 provided for the appointment of commissioners in condemnation proceedings to fix compensation, etc. Section 5 of the act provided that after being sworn, etc., the commissioners should proceed, without delay, upon view and inspection of the premises, as well as upon hearing the allegations and proofs of the parties, to fix the compensation to be made to each party or owner of land to be taken, and also estimate and assess the damages sustained by any person or persons by reason of the construction and use of the

work specified in the petition, taking into consideration and estimating the benefits and advantages to the parties resulting from the construction and use of the improvement; provided, that said commissioners shall not estimate any benefits or advantages which may accrue to lands affected in common with adjoining lands, on which such road or canal or other work does not pass." Under this statute, as under the present, compensation was required to be made for the full value of the land taken, without regard to benefits to the remaining land not taken. In assessing damages, however, to the remaining land of the owner, not taken, only special benefits to the land not taken, and not common to adjoining land through which the improvement passed, could be set off. *Hayes v. Railroad Co.*, *supra*; *Railroad Co. v. Black*, 58 Ill. 33; *Emerson v. Railway Co.*, 75 Ill. 176. The Constitution of 1848 provided only that lands should not be taken for public use without just compensation. This was the limitation upon the exercise of the sovereign power of eminent domain. But the people, through their representatives, had the undoubted right of imposing further limitations upon its exercise, and sought by the act of 1852 to provide compensation for damages by reason of the proposed improvement, other than that arising from the loss of the land actually taken, and placed an express limitation in fixing the damages, excluding benefits common to adjoining lands, over or through which the improvement did not pass. By the Constitution of 1870 it was provided that land should not be taken or damaged for public use without just compensation; and the legislature, by the ninth section of the act of April 10, 1872, which, as said in *Page v. Railway Co.*, 70 Ill. 328, "is only for the carrying out of the provision of the Constitution," after requiring the jury to go upon the premises, and from their view, and the evidence heard, to make their report, setting forth and showing the compensation ascertained to each person entitled thereto, provided "that no benefits or advantages, which may accrue to land or property affected shall be set off against or deducted from such compensation in any case," hereby repealing the act of 1852. After the adoption of the Constitution of 1870, and prior to the passage of the act of 1872, now in force, the case of *Railroad Co. v. Francis*, 70 Ill. 238, arose, and was settled under the provision of the Constitution before mentioned;

and a construction was there placed upon the word "damaged," as used in the constitutional provision, and it was said: "We must presume that it was used in its ordinary and popular sense, which is, 'hurt, injury or loss.' Now, we cannot suppose that the framers of that instrument intended it in any other sense than loss or depreciation in the price of the property damaged; that the damage or injury should be real, and not imaginary or speculative. It cannot be said appellee has sustained damage when his property is worth and will sell for as much or more than if no road had been built. It is no damage to him if the construction of the railroad has not increased the value of his lots, whilst it has added thirty, forty or fifty per cent to the value of other property in the vicinity, but differently situated. He has no ownership in or right to such appreciation in the value of property." And after holding that the provision of the Constitution must receive a reasonable construction, and showing that the construction contended for would be ruinous to corporations seeking condemnation, it is said: "We must, therefore, hold that the damage contemplated by the Constitution must be an actual diminution of present value or of price, caused by constructing the road, or a physical injury to the property, that renders it less valuable in the market if offered for sale."

The next case (Page v. Railway Co., supra) arose after the passage of the act of 1872, and it was again held that the test of whether damages accrued to the land not taken was whether there had been a diminution in the market value of the land by reason of the proposed improvement, and that the effect upon the whole tract remaining after part is taken must be considered. It was there insisted that the benefits to the land not taken could not, under the statute, be set off against damages; but it was held that the consideration of benefits by which the land was increased, instead of being diminished, in value, was not deducting benefits or advantages from the damages, "but it is ascertaining whether there be damages or not. It is but the estimation of damages, and seems to be the only fair and just mode of estimating them;" citing *Meacham v. Railroad Co.*, 4 Cush. 292; *Watson v. Railroad Co.*, 37 Penn. St. 469; *Navigation Co. v. Thoburn*, 7 Serg. & R. 410. And it was held: "If the market value of the tract will not be diminished by the construction and operation of the road, the land cannot be said to be damaged thereby."

The next case was *Eberhardt v. Railway Co.*, 70 Ill. 347, and the question was as to the damages resulting to lands not taken, and it was said: "We had occasion to examine the question here arising * * * in the case of *Railway Co. v. Francis* (supra), in which the majority of the court held that under the Constitution and law, where land was not taken, but damaged only, the question should be: 'Will the property be of less value when the road is constructed than it was when it was located?' If so, then the difference is the true measure of damages." And an instruction that, "as to lots not taken, the jury will find, as damages, the depreciation in the market value of the same by reason of the construction and maintenance of said railroad," was approved.

In *Railroad Co. v. Stein*, 75 Ill. 41, suit was brought to recover damages sustained by the construction and maintenance of a bridge, its piers and projections, across the north branch of the Chicago river. It is there said: "If the erection of the bridge was an injury or damage to the premises, permanent in its character, and not such as was shared by the public at large, then it was proper for appellees to establish the fact that the value of the premises had decreased by the erection of the bridge. In other words, it would have been proper to have shown how much less the property would sell for in consequence of the erection of the bridge than if it had not been built."

The next case to which our attention is called is *Railroad Co. v. Henry*, 79 Ill. 290, which we shall have occasion to notice further on.

The case of *Railroad Co. v. Haller*, 82 Ill. 208, was predicated upon an ordinance of the town of Vandalia, and accepted by the railway company, in which it was provided that the company should be bound to pay all damages occasioned by the construction of the road to property owners on the streets through which the road was permitted to run; and, while the same rule was announced, it was placed entirely upon the provisions of the ordinance, and need not be here further noticed.

The next case in which the question was involved was that of *City of Elgin v. Eaton*, 83 Ill. 535. That was an action against the city to recover damages to lots by reason of the change of grade of streets. After holding that the action would lie, the court says: "The question then presents itself, what was the

measure of damages? * * * If the property is worth as much after the improvement as before, then there is no damage done the property. If the benefits received from making the improvement are equal to or greater than the loss, then the property is not damaged for public use. We apprehend there can be no 'damage' to property without a pecuniary loss. If there is no depreciation in value, there is no damage, and, if no injury, then there shall be no recovery;" citing *Railroad Co. v. Francis*, *supra*. The same doctrine is announced, and rule laid down in *Village of Hyde Park v. Dunham*, 65 Ill. 569, upon the authority of the cases before considered.

In *Railroad Co. v. Hall*, 90 Ill. 42, it was held that the damages to property not taken for public use must be real, and not speculative, and it must depreciate the price or its use, "and the depreciation is determined by comparing its value before and after the structure is made which produces the injury. Any benefits thus conferred should be considered, as well as injury inflicted by the structure, in estimating the damages;" citing the *Francis*, *Page*, *Eaton* and other cases in support of this rule.

In *Railroad Co. v. Kirby*, 104 Ill. 347, an instruction saying to the jury "that, in estimating the damages to the balance of the farm through which the railroad ran, you should consider this railroad as running only through this farm, and should not consider any general benefits which the road might be, in making a better market or convenience of travel," etc., was approved. There was no discussion of the question, and it is evident that the view taken was that the instruction was proper, as excluding those general benefits which flow to the public generally, and not such as would appreciate the market value of the particular tract of land.

In *McReynolds v. Railroad Co.*, 106 Ill. 152, the jury were instructed that if, by the construction of the railway, the lands would be specially benefited to the extent, or greater, than they would be damaged, then the jury should only find a verdict for the compensation for the strip of land actually taken. It was insisted that this was contrary to the provisions of section 9 of the Eminent Domain Act; and in the face of *Railroad Co. v. Henry*, 79 Ill. 290, the court, without referring to that case, or to

any other authority in this state or elsewhere, approved the instruction. In so doing the court was in entire harmony with all its former rulings, since the adoption of the present Constitution, except the *Henry case*, *supra*, and, as will be seen, in direct conflict with that case. The objection to the instruction noticed by the court was that the "special benefits" were not limited by the instruction to such as "were not common to other property." It was then said, "'special benefits' mean benefits not common to other property." And it is insisted that this is an authority for the position that benefits cannot be considered in estimating damages where other property may be likewise benefited. The attention of the court was not called to the distinction here sought to be made, and the court did not attempt to determine the question, and undoubtedly used the term, "benefits common to other property," as designating those benefits which flow to the public generally, as distinguished from those which enhance the value of the specific property, and without intending to exclude any elements arising from the improvements that tended to specially enhance the value of the particular property.

In *Dupuis v. Railway Co.*, 115 Ill. 97; 3 N. E. Rep. 720, it was again expressly held that as to the land damaged, but not taken, the measure of damages is the difference between its value before and after the proposed public improvement — in that case, the building of appellee's railroad — citing in support the *Francis and Page cases*, *supra*.

Railroad Co. v. Blake, 116 Ill. 163; 4 N. E. Rep. 488, referred to by counsel, as respects the question here involved, was decided upon the authority of *Page v. Railway Co.*, *supra*, and, as understood by the court, in accordance with the doctrine of that case. The language of the instruction, the giving of which was held not to be reversible error — "Under the laws of this state, no benefits or advantages which may accrue to lands or property, in common with all other property, along the line of the proposed railroad, by reason of its construction and operation, can be lawfully set off," etc. — was understood to mean those benefits of a general nature which each tract of land or parcel of property along the line of railway shared in common, by reason of increased facilities for traffic and commerce and the like, and which, while resulting in benefit to the community at large, are

incapable of measurement or computation when applied to a particular tract of land.

In *Concordia Cemetery Assn. v. Minnesota & N. W. R. Co.*, 121 Ill. 199; 12 N. E. Rep. 536, the doctrine is again announced that the market value of the land before and after the construction of the railroad furnished the true criterion for determining the damages to lands damaged, but not taken, and is in entire harmony with the *Page* and other cases previously considered.

In *Railroad Co. v. Bowman*, 122 Ill. 595; 13 N. E. Rep. 814, it was again held, "If the lands not taken would be depreciated in value by the construction and operation of the proposed railroad, the measure of damages would be the difference in their market value before the construction of the road and after its construction;" citing the *Francis*, *Page*, *Eberhardt*, *Hall* and *Dupuis* cases.

In *Kiernan v. Railway Co.*, 123 Ill. 188; 14 N. E. Rep. 18, an instruction saying to the jury that "the decrease, if any, in the actual, fair cash market value of the lands and property not taken, by reason of the construction and operation of the railroad, are the proper measures of damages and compensation which you are to ascertain in this case," was expressly approved.

Harwood v. City of Bloomington, 124 Ill. 48; 16 N. E. Rep. 91, was a proceeding by the city to condemn property for street purposes under article 9 of the Cities and Villages Act. The court after holding that where land is taken for public improvement the owner, under our Constitution and statute, is entitled to the value of the land actually taken, without regard to any supposed benefits that may accrue from the improvement (*Green v. Chicago*, 97 Ill. 371), says: "But where the owner interposes a claim for damages to that portion of the land not taken, in consequence of the improvement, if the land not taken has received special benefits—benefits not common to other property—such benefits may be considered in arriving at the amount of damages the owner may have sustained to his property not taken." The court was not there called upon to define what were "special benefits," or when benefits were "common to other property," and did not attempt to do so. The sense, however, in which the words were used in the opinion in that case is clearly indicated by the cases cited in support, among which are *Village of Hyde*

Park v. Dunham, City of Elgin v. Eaton, the Page case and McReynolds v. Railroad Co., *supra*.

In Railway Co. v. McDougall, 126 Ill. 111; 18 N. E. Rep. 291, it was held that the measure of damages to the land not taken is the difference between the value of the land, as a whole, before and after the construction of the road built according to the plan proposed, citing a number of the earlier cases before considered.

Railway Co. v. Aldrich, 134 Ill. 9; 24 N. E. Rep. 763, is an instructive case. There an instruction was given, stating to the jury that, in estimating the damages to the defendant's land not taken, they should consider the railroad as running only through his farm, and should not consider any general benefits which the road might occasion, by making a better market, or by affording convenience for travel, and that it would not be proper to take into consideration such benefits as the defendant might enjoy in common with the owners of other lands through which the road might run, etc. The court said: "The general benefits arising from the construction and operation of the road, and which the defendant will share in common with others, will grow out of the fact that the road is not limited in its extent to one locality, but is to connect, and form a commercial highway between, points distant from each other. The instruction to the jury to consider the road as running through the defendant's farm was manifestly given for the purpose of eliminating from their minds all consideration of those general or commercial advantages which will flow to the public from the construction of the road, but which should in no way influence the assessment of damages." It was not necessary for the court there to determine what was the special benefit, but the opinion clearly shows that by "benefits enjoyed in common with others" was meant those general and commercial advantages which flow to the public from the construction and operation of the road.

Springer v. City of Chicago, 135 Ill. 552; 26 N. E. Rep. 514, was a suit brought to recover damages alleged to have been caused by the construction of a bridge and viaduct, and approaches thereto, in one of the streets of Chicago. The court gave for the defendant instructions by which the jury were directed that "if by the improvement, as a whole, the property is benefited as much as it is damaged by the construction," etc., "alone, then there can

be no recovery." It was said of this instruction: Where an action is brought to recover damages where property is damaged by a public improvement only, "the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before, no damage has been sustained, and no recovery can be had." And again the Eaton, Francis, Hall, Haller, Eberhardt and Page cases are referred to as sustaining the position of the opinion. And this is again followed in *Railway Co. v. Eaton*, 136 Ill. 9; 26 N. E. Rep. 575 — a condemnation case — and the like doctrine announced.

In the later case of *Washington Ice Co. v. City of Chicago*, 147 Ill. 327; 35 N. E. Rep. 378 — also a condemnation case — it is said: "For land taken no benefits to lands not taken can be set off, but payment of the compensation for the damages accruing to the land not taken may be made in benefits to the property not common to the other property affected; that is, the special benefits accruing to the particular property may be set off against the damages to the land not taken by the improvement. So that if the special benefits equal or exceed the damages the owner can recover nothing as damages to property not taken. If less, he will recover the difference only." As a matter of course, in using the language that special benefits may be set off against the damages done to the land is meant that in estimating the damages to the land not taken the special benefits accruing to it from the improvement must be considered, so that if the benefits equal the damages which would otherwise be done, there is no damage, and can be no recovery. The case of *Railroad Co. v. Henry*, 79 Ill. 294 (before referred to), announces a different rule, and cannot be reconciled to the other cases to be found in this state. It is there held that under the statute (act of 1872) the question of benefits can in no case be considered in estimating the value of land taken, or in estimating the damages to land not taken. None of the cases previously decided, as before shown (nor indeed is any other authority referred to), sustain the doctrine of that case. And we have been unable to find any subsequent case in which it has been cited, except *McReynolds v. Railroad Co.*, 106 Ill. 152, where it was

referred to by counsel, as before shown. But it is not referred to in the opinion, and a holding contrary to it is made. There may be expressions in other cases seemingly inconsistent with the doctrine of the Page case, but when the opinions are considered in the light of what was then before the court, as must always be done, they will be found not to be irreconcilable with the general doctrine.

By a practically unbroken line of decision in this state it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect of the improvement upon the value of the land. Under the rule the land is said to be damaged only when there is a diminution in its value — a depreciation in its price or worth — and the compensation required to be made is the amount of depreciation or diminution in value occasioned by the construction and operation of the railroad or other improvement. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. *Wilson v. Board*, *supra*; *Bohm v. Railway Co.*, 129 N. Y. 576; 29 N. E. Rep. 802; *Rigney v. City of Chicago*, 102 Ill. 64. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause — that is, also specially benefited by the improvement — furnishes no excuse for excluding the consideration of special benefits to the particular property, in determining whether it has been damaged or not, and, if it has, the extent of the depreciation in value. On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land, and such as are capable of measurement and computation. Hence, all imaginary and merely speculative damages or benefits are excluded from consideration. The consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damage to the property, but is the simple ascertainment of whether the land has been in fact depreciated in price or worth — that is, whether loss or damage has resulted to the owner; for, if his property is of the same value after as before the improvement, he has sustained no loss. If he has lost nothing — if his property has not been depreciated in price or value — it is not damaged, within the

meaning of the Constitution, and there can be no recovery. There can be no damage to property without pecuniary loss or injury which lessens its value. It, therefore, follows that every element arising from the construction and operation of the railroad or other public improvement, which, in an appreciable degree, is capable of ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it. Thus, the situation of the property; the use to which it is devoted, and of which it is susceptible; the character and extent of the business to which it is adapted before and after the construction of the public work, and, indeed, every fact and circumstance legitimately tending to show a depreciation or enhancement of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land without and with the proposed taking for the public use; while, on the other hand, a consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which, in determining the injury or benefit to the particular tract of land, cannot be other than conjectural and speculative, is excluded. We need not pursue the discussion. It is apparent, as before stated, the real question to be determined is the value of the land not taken at the time of filing the petition for condemnation, with and without the improvement. *Commissioners v. Dunlevy*, 91 Ill. 49; *Concordia Cemetery Assn. v. Minnesota & N. W. R. Co.*, 121 Ill. 205; 12 N. E. Rep. 536. Other cases in this state, among which may be mentioned *City of Shawneetown v. Mason*, 82 Ill. 337, and *Rigney v. City of Chicago*, 102 Ill. 64, amply support the views expressed. See, also, *City of Atlanta v. Green*, 67 Ga. 386; *City of Atlanta v. Word*, 78 Ga. 276; *Newman v. Railway Co.* 118 N. Y. 618; 23 N. E. Rep. 901; *Bohm v. Railway Co.*, 129 N. Y. 576; 29 N. E. Rep. 802.

Nor can it be said that the error in giving the instruction indicated was cured by other instructions in the case. It is true, the jury, by the third instruction, were told " 'just compensation' means the payment of such sums of money to the owners of

property proposed to be taken or damaged as will make them whole ; so that, on receipt by such owners of the compensation and damages awarded, they will not be poorer by reason of their property being so taken or damaged." That this is an accurate statement of the law is not questioned. But it was immediately followed by the eleventh, twelfth, fourteenth, sixteenth, twenty-first and other instructions, in which the jury were specifically told that in arriving at the compensation they must exclude from their minds, and had no right to take into consideration, or to offset against any damages which may be sustained, any benefits or advantages which may accrue to said property in common with other property in the vicinity of the line of the proposed railroad, by reason of its construction and operation. The jury would understand from these instructions that, in determining the compensation to be paid for land not taken, all benefits to the particular property, where like benefits were conferred upon other property in the vicinity by the construction of the railroad, must be excluded from their consideration, although such benefits might materially enhance the value of appellees' lots, and even to an extent that would show there was no depreciation therein by reason of the building of the railroad, and would award just compensation upon that basis.

In respect of the second instruction given for appellees, without quoting it, it should be said that the jury have little to do with the theory and policy of the law. An instruction should be so drawn as to be a concise and accurate statement of the law, as applicable to the facts of the particular case. While the giving of this instruction would, perhaps, not be prejudicial error, it was improper, as bringing to the attention of the jury, in an argumentative form, matters with which they had no immediate concern. For the error in giving the instructions before indicated, the judgments in the several cases involved in this appeal are reversed, and the cause is remanded. Reversed and remanded. MAGRUDER, J., dissents.*

Eminent domain — benefits to part not taken.—When part of a lot or tract of land is taken for public use, just compensation to the owner requires that he should be paid the damages, if any, to the part remaining. Lewis

* Reported in 150 Ill. 362; 37 N. E. Rep. 1098.

Em. Dom. § 464. The courts seem to be at one upon this point. Upon the right to consider benefits to the remainder by reason of the work or improvement there is great diversity of opinion. The cases are reviewed at length in **Lewis Em. Dom. §§ 465-476.** The question has received careful attention in the following cases in these reports: **Newman v. Metropolitan Elevated R. Co.**, 2 Am. R. R. & Corp. Rep. 318; **Springer v. City of Chicago**, 4 Am. R. R. & Corp. Rep. 52; **Bohm v. Metropolitan El. R. Co.**, 5 Am. R. R. & Corp. Rep. 416. The following recent decisions are also particularly in point in the same connection: **Bookman v. New York El. R. Co.**, 137 N. Y. 302; 33 N. E. Rep. 333; **Sutro v. Metropolitan El. R. Co.**, 137 N. Y. 592; 33 N. E. Rep. 334; **Steubing v. New York El. R. Co.**, 138 N. Y. 658; 34 N. E. Rep. 369; **Sixth Ave. R. Co. v. Metropolitan El. R. Co.**, 138 N. Y. 548; 34 N. E. Rep. 400; **Saxton v. New York El. R. Co.**, 139 N. Y. 320; 34 N. E. Rep. 728; **Nicks v. Chicago, etc., R. Co.**, 84 Iowa, 27; 50 N. W. Rep. 222; **Strayer v. Georgia, S. & F. R. Co.**, 90 Ga. 56; 15 S. E. Rep. 637; **Stewart v. Ohio River R. Co.**, (W. Va.) 18 S. E. Rep. 604; **Mahaffey v. Beech Creek R. Co.**, (Penn.) 29 Atl. Rep. 881. In the last case the Pennsylvania rule is thus stated: "The advantages to a property, resulting from the construction of a railroad, which are to be considered in connection with the disadvantages, are such as are special to the property affected, and give it an increased value above the general appreciation of property in the neighborhood. This rule, without qualification or limitation, has been applied in a long line of cases, among which are **Hornstein v. Railroad Co.**, 51 Penn. St. 87; **Railroad Co. v. Robinson**, 95 Penn. St. 426; **Railway Co. v. McCloskey**, 110 Penn. St. 442; 1 Atl. Rep. 555; **Long v. Railroad Co.**, 126 Penn. St. 143; 19 Atl. Rep. 39. In **Railway Co. v. McCloskey**, *supra*, **CLARK, J.**, said: 'The adjustment of this difference involves in all cases a fair and just comparison of the advantages and disadvantages resulting from the opening and operation of the road, and the construction of its works; but the advantages to be considered are such only as are special, and the disadvantages such as are actual. The general appreciation of property in the neighborhood, consequent to the projected construction of the road, cannot enter into the calculation. To this the landowner, whose land has been taken, is as fairly entitled as his neighbor, whose possession and enjoyment have not been disturbed.' "

CINCINNATI, W. & M. RY. CO. v. CITY OF ANDERSON.

(Supreme Court of Indiana, September 27, 1894.)

1. **EMINENT DOMAIN. EXTENDING STREET THROUGH RAILROAD YARDS. INJUNCTION.** Under the general law permitting cities to establish streets, they have implied power to extend streets across the right of way of a railroad, where both uses may co-exist, without material injury to the railroad right of way. But when the railroad use will be materially impaired or destroyed, the opening of the highway will be denied.

2. A street cannot be extended through the yards, and across the tracks of a railroad company, where to do so would require the destruction and removal of a turntable, water tank, engine house and coal dock, though such structures might be rebuilt and conveniently used on other land of the railroad in the vicinity.

ACTION by the Cincinnati, Wabash & Michigan Railway Company against the city of Anderson for an injunction. There was a judgment for defendant, from which plaintiff appeals.

C. E. Cowgill, for appellant. *F. P. Foster* and *H. C. Ryan*, for appellee.

HACKNEY, Ch. J. This was a suit by the appellant to enjoin the extension of Seventh street in said city, from the east line of the appellant's right of way westward across the main track and five side tracks in appellant's yards. Within said yards were an engine house of brick and stone, containing six stalls, and being 60 feet deep, 80 feet long in front and 140 feet long in the rear. In front of this building was a turntable, from which there were six tracks extending into said engine house and connecting with the six stalls therein. In said yards were also a water tank, from which locomotives were supplied with water, and also a coal dock, constructed from timber and lumber, the same being twenty-three feet wide by eighty-six feet in length and from which the locomotives of the appellant were supplied with coal. The various side tracks within said yards were used for the storage of freight and passenger cars, and for making up trains, and for reaching said water tank, coal dock, turntable and roundhouse. Said engine house was not large enough for the business of the company, and additions were contemplated. To extend said street as projected would not only inconvenience the appellant in the use of its yards, by meeting the uses of the street by the public, and increasing the hazards of the business, but it would take within the lines of said street two of the stalls of said roundhouse and a considerable portion of said coal dock, and would not permit the use of said water tank without encroaching upon said street slightly. Immediately south of the projected street, parallel with said tracks and a part of said yard, the appellant owned ground upon which such water tank, coal dock, turn-

table and roundhouse could have been located, and with changes in some of the side tracks mentioned, could have been used as conveniently and practically with the same advantages, excepting the necessity of keeping said projected extension free from standing cars, and the said added hazards by reason of the crossing and recrossing by the public of the appellant's said tracks. That the uses for which the appellant employed the strip proposed to be taken for the street crossing were of a public character, and that it could not be appropriated to the uses of a public street, if to do so would destroy or become inconsistent with the purposes for which they were so employed, is conceded by the parties. The question upon which the controversy hinges, and upon which counsel have placed the case in argument, is this: Can these buildings and structures be destroyed, and removed from their fixed location, and their use where situated be entirely thwarted, and their location applied to a new public use, upon the showing that they may be rebuilt, and conveniently and practically used for the same purposes on other land of the company, near to that now occupied?

Under the general law permitting cities to establish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad, when in doing so the uses for which such right of way is employed are not materially injured or destroyed, and where such uses and those for a street may co-exist without impairment of the first uses. But where such uses cannot so co-exist, or where the first use is materially impaired or destroyed, it is well settled in this state and elsewhere that the second public use will be denied. *Lake Erie & W. Ry. Co. v. Town of Boswell*, 136 Ind. —; 36 N. E. Rep. 1103; *City of Ft. Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558; 32 N. E. Rep. 215; *City of Seymour v. Jeffersonville, M. & I. R. Co.*, 126 Ind. 466; 26 N. E. Rep. 188; *City of Valparaiso v. Chicago & G. T. Ry. Co.*, 123 Ind. 467; 24 N. E. Rep. 249; *Railroad Company v. Williamson*, 91 N. Y. 552; *In re City of Buffalo*, 68 N. Y. 167; *In re Boston & A. R. Co.*, 53 N. Y. 577; *Railroad Co. v. Bronnell*, 24 N. Y. 345; *Milwaukee & St. P. Ry. Co. v. City of Faribault*, 23 Minn. 167; *Railroad Co. v. Muder*, 49 Mo. 165; *Mohawk & H. R. Co. v. Artcher*, 6 Paige, 83; *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn.

359; 15 N. W. Rep. 684; New Jersey Southern R. Co. v. Long Branch Comrs., 39 N. J. Law, 28.

At the point of the crossing of the projected extension of Seventh street and the right of way of the appellant, there are other public uses existing than the mere maintenance of tracks for the transportation of passengers and freight, or the storage of cars and the making up of trains. The turntable, the water tank, the engine house, the coal dock, are, each and all, not only generally essential to the business and successful operation of a line of railway, but in this instance they were made to serve two divisions of railway each having a terminus at the city of Anderson, where locomotives were supplied with coal and water, and were housed when not in service. Not only were they essential, but it is not even suggested that they could be dispensed with. That they were, of themselves, when connected with the operation of the railway, public uses, not only appears from their necessity to the successful operation of a railway, but from the numerous cases holding that for such uses real estate may be condemned and appropriated under general laws for the appropriation of real estate to railway uses. In re New York Cent. & H. R. R. Co., 77 N. Y. 248 (for freight and warehouses); Low v. Railway Co., 18 Ill. 324 (paint shops, lumber and timber sheds); Railroad Co. v. Muder, 49 Mo. 165, and Railway Co. v. Wilson, 17 Ill. 123 (depot, engine house and repair shops); Railroad Co. v. Kip, 46 N. Y. 546 (depots, coal sheds, engine houses, etc.). There are probably many other like cases, but we think there can be no doubt upon this conclusion, which finds added support from the cases expressly denying the right to condemn, and apply to street crossing, property of like character already in use for such purposes by railway companies. City of Valparaiso v. Chicago & G. T. Ry. Co., supra; City of Ft. Wayne v. Lake Shore & M. S. R. Co., supra; Railroad Co. v. Williamson, supra; Milwaukee & St. P. Ry. Co. v. City of Faribault, supra; St. Paul Union Depot Co. v. City of St. Paul, supra; Winona & St. P. Ry. Co. v. City of Watertown, (S. D.) 56 N. W. Rep. 1077; New Jersey Southern R. Co. v. Long Branch Comrs., supra.

The theory of the appellee and that adopted by the Circuit Court is that such buildings and structures are not indispensable, for the reason that they may be conveniently located elsewhere,

and after relocation the uses of the street and the railway may coexist. This theory is not new, but, if adopted by any of the adjudged cases, the fact has not been discovered by us. On the contrary, numerous cases have denied it. In *Railroad Co. v. Kip*, *supra*, it was said: "It is claimed that there are other lands in the same vicinity, equally adapted to the use of the applicant, as those sought to be acquired by these proceedings, and which possibly might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company is within the discretion of the managers, and courts cannot supervise it." In *New York Cent. & H. R. R. Co. v. Metropolitan G. L. Co.*, 5 Hun, 201, it was said: "Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands, by adopting another curve, we are not prepared to concur with the appellant's counsel. It is not a question of possibilities, nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by the conflicting evidence, whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it cannot be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purpose." In *Eldridge v. Smith*, 34 Vt. 484, it was held that "when land is taken for a legitimate railroad use by the railroad company, the judgment of the officers of the road, unless clearly beyond any just necessity, is regarded as conclusive." We may add that if round houses, water tanks, coal docks, or other necessary uses of a railway, may be disturbed and relocated, or their location destroyed, it becomes a matter of extreme difficulty, if not an impossibility, to discriminate between such right and the right to require tracks to be removed for the benefit of other public uses; and further, if the removal of such buildings and structures may be required to appropriate their location to other public uses, it would be difficult to determine

why depots should not be subject to the same rule. Another difficulty in adopting the theory contended for by the appellee is that the rule could not be made to depend upon the proximity of the old to the new location, for if the removal were required, and there was no ground for the new location in the immediate vicinity, public necessity, in pressing its demand for a street crossing, could insist with force that remote situations afforded equal or better facilities for the convenient and safe employment of the uses sought to be superseded. Without legislative sanction it is our opinion that such uses cannot be destroyed upon the mere discovery that they may be enjoyed at some place other than the point of their location.

It is suggested that the act of March 6, 1891 (Acts 1891, p. 122), purporting to authorize the removal of buildings and structures of railway companies from the lines of projected streets, and permitting the use of crossings at such points, grants the power sought in this case to have been exercised. The proceedings to condemn the crossing were instituted, and the reference of the matter to the city commissioners was as early as December 1, 1890, and said commissioners filed their report of meeting and examination in January, 1891. This suit was commenced and the venue changed before the passage of said act. We are unable to find any reason or authority for the suggestion so made. There can be no pretense that any step was taken pursuant to said act. If the act should be considered as affecting the questions in this case, it should probably be in the implication thereby of the legislative determination that without the act no power existed to require the removal of such buildings.

In our opinion the Circuit Court erred in its finding and judgment, and the appellant's motion for a new trial should have been granted. The judgment is reversed.*

1. Right to lay out street across railroad tracks or through railroad yards, grounds or buildings.—There is no question about the power of the proper public authorities to lay out a street or highway across the right of way of a railroad company, under a general authority to establish highways and streets. Lewis Em. Dom. § 266. As to the second branch of the question, the general rule is that under a general authority to establish or extend streets, a street cannot be laid out through railroad grounds so as to take or materially

* Reported in 38 N. E. Rep. 167.

interfere with depots, freight houses or any similar structures. Lewis Em. Dom. § 266. As to grounds covered with tracks and used for storing and switching cars, the result would, perhaps, depend upon the circumstances of the particular case. In *Commissioners v. Detroit, G. H. & M. R. Co.*, 98 Mich. 58; 52 N. W. Rep. 1083, it was held that a boulevard could be laid out across the right of way of defendant, although it had been filled with tracks, some of which were used for main tracks and some for storing cars, and was used and known as a "yard" at the point in question. Here the plaintiffs were acting under a general authority to take any land found necessary for opening or extending any boulevard. The cases of *Illinois Central R. Co. v. City of Chicago*, 141 Ill. 586; 30 N. E. Rep. 1044, and *Chicago & N. W. R. Co. v. City of Chicago*, (Ill.) 37 N. E. Rep. 842, are similar to the Michigan case, except that the authority conferred upon the city was somewhat broader. The city of Chicago had express power to open or extend any street over or across "any railroad track, right of way or land of any railroad company within the corporate limits." In the case last cited the court says: "The particular ground of contention is that the strip of land sought to be condemned had been devoted to the specific public use of a railroad yard. A railroad yard is a tract of ground upon which are railroad tracks, used for the purpose of receiving and storing cars when not in use, or used for the purpose of switching in the distribution of cars and engines to other places and in the making up of trains. As shown by the foregoing statement, there were upon the 100-foot strip, at the point of the proposed street crossings, eight parallel railway tracks connected by switches. Two were used for passenger trains, two for freight trains, and the others for such use as the convenience of the company demanded in the switching and storing of cars. It is insisted that there is no express authority given by the legislature to the city to open streets across the land in question. It seems to be well settled that to authorize the taking by the municipality, for a public use, land already devoted to another public use, the legislative intent to grant the authority must be shown by clear and express language or by necessary implication from the words of the grant. * * * It is contended, however, that the terms 'right of way,' 'tracks, and 'land,' as used in the eighty-ninth paragraph, apply only to such right of way, tracks and land as are appropriated to the active operation of the company's railway, and that they do not apply to tracks or land devoted to the purposes of a railroad yard. The attempted distinction is without foundation. Without pausing to discuss or determine what would be the effect of an attempt by the city to open a street, under the power conferred by this paragraph of the statute, through depots, engine houses and the like, it is sufficient to say that the attempt here was simply to extend the streets across land devoted to railroad tracks. The tracks upon the land sought to be taken, although some were devoted to the passage of passenger trains, others for the accommodation of freight traffic, and still others used for switching purposes, and devoted to the storage of cars, were each 'railroad tracks,' and it cannot be important to what particular use the 'railroad tracks' may be devoted. By the express terms of the statute, power is given to the city authorities to extend streets, alleys, and highways over and across the same. The right of the legislature to exercise the power of eminent domain, and to invest the

municipal authorities of the state with the power is clear; and that it may extend to railroad property is not questioned. Const. § 14, art. 11; *East St. Louis C. Ry. Co. v. East St. Louis U. Ry. Co.*, 108 Ill. 265; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 105 Ill. 389. It will be unnecessary to determine the question, pressed upon us with so much force, that, where both uses may not stand together, with such tolerable interference that compensation can be made by the payment of damages; that is, if the use of the land for a street, when exercised, will exclude the former use, to which the land was appropriated, it cannot be implied from the general power to extend streets over and across rights of way, tracks and land, and the legislature meant to subject the land to the new public use to the exclusion of the prior public use; that is, it cannot be implied from the general language that the legislature intended to destroy the prior use. True, as already said, the opening of the street would exclude from the tracks within the street the use of such tracks for the purpose of storing cars thereon. But it is manifest that it is an interruption of the use only at the crossings, and, if damages accrue because of the taking of that right, or the value of the property of the railway company not taken is decreased in value in consequence, adequate compensation can be made in the proceeding at law."

2. Measure and elements of damages when a street is laid out across railway tracks and grounds.—The measure of compensation for railroad land taken by a city for a street is the decrease in its value for railroad use, caused by its use as a street, without reference to such expenditures as the railroad company may be obliged to make in complying with the police regulations of the city in regard to street crossings. *Lake Shore & M. S. R. Co. v. City of Chicago*, 148 Ill. 509; 37 N. E. Rep. 88; *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 157; 37 N. E. Rep. 78. The fact that the railroad company owns the land in fee makes no difference in the measure of compensation, since a railroad company has no right to use any land for other than railroad purposes. *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 157; 37 N. E. Rep. 78. Where a street is laid out across tracks used for storing cars, the railroad company may recover such damages as it will sustain by being deprived of such use of the tracks within the limits of the street. *Chicago & N. W. R. Co. v. City of Chicago*, — Ill. —; 37 N. E. Rep. 842. So where a street was laid out across tracks near a large switching yard, which formed the "neck," as it was called, of the yard, and was used in connection with switching and making up trains in the yard, it was held that the company was entitled to recover damages to its yard caused by laying out the street at the point in question. The court says: "The company was shown to own, and be in use of, a large switch yard, lying south of the proposed street, and that the 'neck,' as it is called in the evidence, of the switch tracks, necessary in the operation of said yard, extended north across and beyond the street. For the purpose of showing that the opening of Sixtieth street, as proposed, would damage the same, and decrease its value, appellant called witnesses, and, after laying the foundation therefor, by showing them experienced in railway operation, asked them the effect upon the switch yard of the opening said street. Objection thereto was interposed and sustained, and appellant excepted. The evidence introduced by appellant, and admitted,

tended to show that, in the use of such yards, the operation of appellant's switch engines would be retarded and hindered; that it would require an increased expenditure of money daily to perform the same operations in handling, switching cars, making up trains, etc., now carried on, after the opening of the proposed street. The witnesses were asked and approximated the average daily increased expenditure to the railway company by reason thereof. It is, in effect, conceded that this last evidence was proper for the consideration of the jury, in determining damages to land not taken, if any such damages were shown. It was, under all the rulings, clearly competent evidence, as tending to show damages to property not taken." On the subject of compensation in such cases generally, see *Boston & Albany R. Co. v. City of Cambridge*, 8 Am. R. R. & Corp. Rep. 436, and cases cited in note thereto.

MONTGOMERY V. SANTA ANA & W. RY. CO.

(Supreme Court of California in banc, September 13, 1894.)

1. **RAILROADS IN STREETS. DISTINCTION BETWEEN COUNTRY HIGHWAYS AND CITY STREETS.** There is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and in the extent of the servitude in the land upon which they are located.

2. **LEGITIMATE USES OF CITY STREETS.** When land is acquired for a street in a city, it is subject to all the uses and purposes of the public as a street, including the construction of sewers and drains, the laying of gas and water pipes, the erection of telegraph and telephone wires, and including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and such uses must be deemed to have been in contemplation when the street was opened, whether by dedication, purchase or condemnation proceedings, and hence such uses impose no new burden or servitude upon the soil or abutting land.

3. **NO DISTINCTION BETWEEN RAILWAYS FOR PASSENGER TRAFFIC AND FOR BOTH FREIGHT AND PASSENGERS.** No reason exists for a distinction between railroads designed exclusively for passenger traffic and railroads designed to carry both freight and passengers, as respects the burden thereby imposed upon the street. The difference, if any, is of degree and not of kind.

4. **EJECTMENT AGAINST RAILROAD IN STREET.** Where a railroad is laid in a public street without authority, ejectment will lie by the owner of the fee, but if the road is laid under legislative authority, ejectment will not lie. In such case the owner should be remitted to an action to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

5. **DAMAGE TO ABUTTING PROPERTY.** In an action of ejectment by the owner of the fee of a street, against a railroad laid therein, no question of damages to abutting property arises.

EJECTMENT by Victor Montgomery against the Santa Ana and Westminster Railway Company. Judgment for plaintiff, and defendant appeals.

Jas. G. Scarborough, for appellant. *Victor Montgomery*, in pro. per.

PER CURIAM. This is an action of ejectment to recover possession of a strip of land in the city of Santa Ana, county of Orange.

Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals.

Defendant, by its answer, set up two separate defenses. In the second of these it set out (1) that it is a corporation with power to construct and operate a steam railroad for the transportation of freight and passengers from the city of Santa Ana to Westminster, across, along and upon any street, avenue or highway ; (2) that a strip of land thirty feet in width off the entire north side of the land described in the complaint was and is a public street or highway in said city of Santa Ana, under the control of and in the possession of the board of trustees of said city ; (3) that said board of trustees, by ordinance, authorized and licensed defendant to construct and operate a railroad through and over said street for carrying freight and passengers in cars to be propelled by dummy or motor engines ; (4) that it constructed its road on said street and operated it as provided in said ordinance ; (5) that it has not excluded plaintiff or others from the street, and has only used it for the purpose aforesaid, and in common with the public, and has not impaired said street, or curtailed the use thereof by others, etc. To this defense plaintiff demurred upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained by the court, and defendant declined to amend as to this defense, and the action of the court in sustaining the demurrer is urged as error.

The whole proposition involved in this case may be put thus : Can the owner in fee of land abutting upon a public street in an incorporated town maintain an action of ejectment against a railroad company organized and existing for the transportation of freight and passengers from said town to a neighboring town,

which company, under and by virtue of an ordinance of the trustees of the first-designated town empowering it to do so, has constructed and is using a railway track upon and over said public street, and upon the side or half thereof adjoining the land of such abutting owner? The question is stated thus for the reason that, while the evidence in the case, consisting of the deed to respondent and the city map together, show that his land abutted upon the street in question, viz., Second street, in the city of Santa Ana, yet by section 1112 of the Civil Code "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway to the center thereof, unless a different intent appears from the grant." There is nothing in the evidence to indicate the contrary, and hence we must presume respondent owns to the center of the highway or street, subject only to the right of the public to an easement or right of way for street purposes therein and thereto. All streets are highways, but not all highways are streets. *Common Council v. Croas*, 7 Ind. 9; *City of Lafayette v. Jenners*, 10 Ind. 74; *Clark v. Com.*, 14 Bush. 166. In other words, there is wide distinction between a highway in the country and a street in a city or village as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and, as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens in their more densely populated limits. It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation

being made ; but the consensus of modern opinion seems to be that no such distinction properly exists, and that "whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways." *People v. Kerr*, 27 N. Y. 202 ; *City of Cincinnati v. White's Lessee*, 6 Pet. 432 ; *Thomp. Highw.* 7 ; *Elliott Roads & S.* 205. It is said by Elliott, in his work on *Roads and Streets*, at page 299, that "it is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets." It authorizes the use of the street for the track of a street-car company under license by the city authority, without compensation to the owner of the fee. *Finch v. Railway Co.*, 87 Cal. 598 ; 25 Pac. Rep. 765.

A "street railway" has been defined as "a railway laid down upon roads or streets for the purpose of carrying passengers." Elliott, *supra*, 557. It is further said by the same author that "the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight." It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily-laden freight trains are drawn cannot be considered a street railway. Street cars are little more than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and, therefore, the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved

methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree, and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway sixteen feet in width, constructed for the transportation of burdens, while the paths of eight feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them, by grade, width and structure of roadbed to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned, so far as ease, speed and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening a road or street, and, therefore, add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public,

upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with.

The thirteenth subdivision of section 862 of the Municipal Government Act of this state authorizes the boards of trustees of municipalities of the sixth class, of which Santa Ana is one, "to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon * * * in the public street." The world moves. Legislation in recent times has kept pace with the progress of the age. The trend of judicial opinion, except where overshadowed and incrustated with stare decisis, is to a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and country; and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public, and essential to its health, enjoyment and progress. In *Paquet v. Railway Co.*, 18 Oreg. 233; 22 Pac. Rep. 906, which was an action to enjoin a steam-motor railway company

from constructing and operating its road upon a street in the city of Portland and upon a county road outside the city, abutting upon both of which the plaintiff owned land, with the fee in him vested to the center of the street and road, and where no compensation had been made to plaintiff, the court in its opinion, by Thayer, Ch. J., in deciding the cause against plaintiff, said: "The establishment of a public highway practically divests the owner of a fee to the land upon which it is laid out, of the entire present beneficial interest, of a private nature, which he has therein. It leaves him nothing but the possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory, and should be laid away among the antiquities of the past age." *McQuaid v. Railway Co.*, 18 Oreg. 237; 22 Pac. Rep. 899, enunciates a like doctrine. In *Henry Gauss & Sons Manuf. Co. v. St. Louis, K. & N. W. Ry. Co.*, 113 Mo. 308; 20 S. W. Rep. 658, the Supreme Court of Missouri held, in substance, that the construction and operation of an ordinary steam railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of the Constitution. The court said: "When land is dedicated generally, and without restrictions, or condemned, for a public street, in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted, which are consistent with the proper use of the street,

without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. * * * For any damages that may be caused by an unlawful or negligent maintenance of the track in the street, or by negligent use of engines or movement of trains, defendant will be liable in an action for damages." This decision is in line with the decisions in that state. In Iowa a like doctrine prevails. In *Barney v. Keokuk*, 94 U. S. 324, which was ejection in the United States court for the district of Iowa, to recover certain premises within a public street in Keokuk, occupied with railroad tracks, buildings, sheds, etc., upon error to the Supreme Court of the United States, that tribunal held that although no permanent obstruction, like a depot building, could be erected on the streets of a town, yet it is held in that state (Iowa) that they may, by public authority, be occupied by railway tracks without the consent of the adjacent proprietors, and without compensation, whether the fee of the streets, as in that case, be in him or in a third person. The court further held that there was no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein. *Kucheman v. Railway Co.*, 46 Iowa, 366. In New Jersey it is held: (1) That the legislature has power to authorize the use of a public highway for the purpose of a railway. (2) That the legislature must be the judges as to the benefit to the public, and to their authority the public and individuals must submit. (3) The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, is not such a taking of private property for public purposes as requires compensation to the owner of the fee of the adjacent lands, as is contemplated by their Constitution. (4) That the easement of the highway is in the public, although the fee is practically in the adjacent owner.. "It is the easement only which is appropriated, and no right or title of the owner is interfered with." *Morris & Essex R. Co. v. Mayor, etc., of Newark*, 10 N. J. Eq. 352. In *Spencer v. Railroad Co.*, 23 W. Va. 406, which was a bill in equity to restrain defendant from constructing and operating an ordinary steam railroad over a public street, the fee of which was in plaintiff, under a license from the municipal authorities, the

court used the following language: "Admitting she (the plaintiff) owns the fee to the middle of Seventh street opposite her lot, as she contends is the fact, she still owns the same, and neither her title or possession is in any manner disturbed by the railroad company. It has always been subject to the easement of the public to pass and repass over it and to use it as a street; and, subject to this easement, she has as much the enjoyment and possession of the whole of Seventh street as she ever had. What the railroad company has taken it has taken from the town council of Point Pleasant—a mere easement—and it has taken nothing from the plaintiff, and, therefore, under West Virginia authorities referred to, she is entitled to no injunction. In *Railroad Co. v. Sawyer*, 92 Ill. 377, the Supreme Court of Illinois held that the public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and, where a railroad company has constructed its road upon and along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.

This being an action of ejectment to recover a specific piece or parcel of land, and it appearing from the stipulation of the parties that the alleged ouster consisted only in the entry by the defendant upon a public street, and the construction of a railroad track thereon, no question of damage to property other than to such public street, within the purview of section 14 of article 1 of the Constitution of this state, can arise.

We may admit that the views herein expressed are in conflict with the doctrine enunciated in *Railroad Co. v. Reed*, 41 Cal. 256, and *Muller v. Railway Co.*, 83 Cal. 240; 23 Pac. Rep. 265, and it does not necessarily follow that ejectment will lie if the facts set out in the answer are true. The cases above quoted were to recover damages. The cases of *Weyl v. Railroad Co.*, 69 Cal. 203; 10 Pac. Rep. 510, and *Finch v. Railway Co.*, 87 Cal. 597; 25 Pac. Rep. 765, in which ejectments were upheld, were cases in which the defendants were mere intruders upon the public street, without valid license from any authorized body. The rule, as defined in *Mahon v. Road Co.*, 49 Cal. 270, is regarded as

the true one in cases of ejectment for injuries like the one complained of here. It was said in that case: "The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disseisin." In the present case the answer to which the demurrer was sustained averred: "That this defendant has not excluded the plaintiff, or any one else, from said street, or any part thereof, nor does it claim to hold said street, or any part thereof, exclusively from the plaintiff, or any one else whomsoever; but this defendant only claims the right to use the portion of said street actually occupied by said track in common with the public, under and by virtue of said ordinances of the said board of trustees of said city, and not otherwise." The action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Anything which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment. The case of *Redfield v. Railroad Co.*, 25 Barb. 54, is on all fours with the present case; and the court there held that the claim of an easement was not a claim of title, and that the mere user of such easement by license of the public, without excluding others from a like user, did not amount to an ouster for which ejectment would lie — intimating, but without deciding, that trespass was in such a case the proper remedy. *Railroad Co. v. Sawyer*, *supra*, is to like effect. The municipal authorities, as trustees of the public, are in possession of the public streets, and hold them for the uses of the public as effectually as they do or may the public buildings of the municipality. A writ of restitution which should put the plaintiff in possession of the street, except as one of the public, would constitute him guilty as a trespasser, or of a nuisance, or of erecting a purpresture, as the facts might determine. It has been said that a writ which authorized A. to be placed in possession of real property, subject to the possession of B., is an absurdity. Where A. enters upon a public street and constructs a railroad without authority from the municipal authorities, ejectment will lie, as was held in *Weyl v. Railroad Co.* and in *Finch v. Railway Co.* This rule proceeds upon the theory that, as defendant does not justify under one having a right to possession, it matters not, as

to him, that another than the plaintiff may have a better right than either of the parties to the action. A reversioner may maintain an action for an injury to his reversionary right, but cannot recover possession until the limited estate lapses. So the holder of the title to a public street, the possession of which is held for the public, may maintain an action for damages to his property therein, but, as against one who has taken no possession thereof, and is only in the exercise of an easement therein which is conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and which will expire with the easement of the public, of which it is a part, should not be permitted to maintain ejectment for a violation of his property rights, if any, but should be remitted to an injunction to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

It follows that the court below erred in sustaining the demurrer to the answer of the defendant. The judgment is reversed, and the court below directed to overrule the demurrer to defendant's second defense, set out in his answer.

Neither BEATTY, Ch. J., nor DE HAVEN, J., participated in the foregoing decision.*

RAILROADS IN STREETS — RECENT DECISIONS.

1. Distinction between street railroads and commercial railroads as respects the use of streets.— When once it is conceded that a railroad of any kind is a legitimate street use, it is difficult to make any logical distinction between roads of different kinds. We have pointed this out at length in a previous note. See 6 Am. R. R. & Corp. Rep. 335-339. It cannot be denied that streets and highways are laid out quite as much for the transportation of things as for the transportation or movement of persons. If it is legitimate to aid the movement of persons by railways laid in streets, why is it not also legitimate to aid in like manner the transportation of goods and merchandise? The principal case takes the position that there is no ground for a distinction between the two kinds of traffic, and disregards the distinction. This position leads inevitably to the conclusion that any sort of railroad is a legitimate street use, at least if it is laid on the surface of the street. The truth is that there are but two consistent positions with respect to this question of railroads in streets. One is that all railroads are legitimate street uses, and the other is that none are. But the law, as established by the decided weight of authority, is that railroads devoted exclusively to street passenger traffic, and laid to conform to the surface of the street, are a

* Reported in 27 Pac. Rep. 786.

legitimate street use, and that all other railroads are not. 6 Am. R. R. & Corp. Rep. 337.

2. Effect of narrowness of street upon its use by a railroad.—In *Lockwood v. Wabash R. Co.*, (Mo.) 26 S. W. Rep. 698, it was held that a city cannot authorize the construction and operation of a railroad through a street so narrow that such use will necessarily destroy it as a public thoroughfare, and deprive abutting owners of reasonable access to their property. The street in question (situated in St. Louis) was devoted to wholesale business, which involved necessarily much heavy teaming. The street was forty feet wide between building lines, with a roadway twenty four feet wide. The defendant had laid a double track steam railway in the street under due authority. There was less than four feet on either side between the sidewalk and the track. The plaintiff was an abutting owner, and sought to enjoin the use of the street by the defendant. A decree perpetually enjoining the defendant from using the tracks was affirmed. The decision is placed both upon the ground that the damage to the plaintiff, under the circumstances, was a violation of the constitutional provision that private property should not be taken or damaged without compensation, and upon certain statutory provisions in the charter of the city and general law of the state. The general law provides that, when a railroad builds its track in a public street by permission of the city authorities, it must restore the street "to its former state, or to such a state as not necessarily to have impaired its usefulness." The city charter contained a provision that "no railroad shall be so constructed as to prevent the public from using any road, street or highway along or across which it may pass." As this case is somewhat of a departure from the Missouri doctrine in regard to railroads in streets, or at least a qualification of it, we quote briefly from the reasoning of the court: "Beginning with *Lackland v. Railroad Co.*, 31 Mo. 183, this court has uniformly held that laying a track on the established grade of a street, under legislative authority, and operating a steam railway thereon, was not subjecting the street to a public use different from that contemplated in the original grant. This proposition was most ably and strenuously attacked in *Gaus & Sons Manuf. Co. v. St. Louis, etc., Ry. Co.*, 113 Mo. 308; 20 S. W. Rep. 658, but we felt constrained by the unbroken line of decisions to adhere to it. *Porter v. Railroad Co.*, 33 Mo. 128; *Cross v. Railway Co.*, 77 Mo. 321; *Smith v. Railroad Co.*, 98 Mo. 24; 11 S. W. Rep. 259; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 97 Mo. 469; 10 S. W. Rep. 826; *Rude v. City of St. Louis*, 93 Mo. 408; 6 S. W. Rep. 257. This proposition unqualifiedly leads to this conclusion: A city may authorize a steam railroad to occupy a street with its tracks, and operate its trains over it. The abutting proprietors cannot recover damages for the injury resulting to their property, although it is subject to smoke, noise and cinders at all hours of day and night, and all ingress and egress for the legitimate purposes of business cut off, except at such times as the railroad may elect not to run trains upon it. Debarred from redress in that direction, they apply to a court of equity to restrain what they conceive is a public and private nuisance, and ask for protection of their own right to use the street as abutting owners, and are met with the assertion that what the law itself licenses cannot be a nuisance, and that they must submit to whatever incon-

venience ensues, because they might have anticipated that the street would be subjected to this servitude when they purchased their property. If these propositions are true, then it results that an abutting property owner on a street may have his property damaged or destroyed without redress, notwithstanding the constitutional guaranty 'that private property shall not be taken or damaged for public use without just compensation.' Const. art. 2, § 21. But, while it has been said that a city might authorize a railroad company to lay its tracks in its streets, it also has been determined by this court and many others that the city could not, in the exercise of its power, create a nuisance in the streets, or devote them, or any part of them, to a purpose inconsistent with the rights of the public or abutting property owners. Thus, in *Dubach v. Railroad Co.*, 89 Mo. 483; 1 S. W. Rep. 86. Judge HENRY, speaking for the whole court, said: 'If the character of a street should be such that defendant's track could not be laid upon the street without hindering the public from using it, then, no matter how important to the company that its track should be laid in that street, it could not be done.' 'Nor is it competent for a city to authorize such use of a street dedicated as a street as will destroy it as a thoroughfare for the public use.' In this case it is too plain to be evaded that the grant conferred by this ordinance practically creates a monopoly in defendant in the use of this street. * * * Every time the defendant uses this street with its trains it absolutely deprives all teamsters of ordinary freight wagons access to this street, and, as the ordinance gives defendant the privilege of using it with its trains as often as it pleases, such use is utterly incompatible with the purposes for which this street was created, and is unreasonable. The municipal assembly had no right to appropriate this street to defendant's use in this way. * * * No case in this state is authority for such exclusive use of a highway, and, if it was, we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not the exclusive right to monopolize a public street, and shut out the public and other carriers. Holding, as we do, that this ordinance, in view of the facts developed, amounts to a practical condemnation of this portion of Collins street to the private and almost exclusive use of defendant, we think the injunction was properly granted by the Circuit Court, and plaintiffs had such an interest as would enable them to maintain the action."

The case of *Commonwealth v. City of Frankfort*, 92 Ky. 149; 17 S. W. Rep. 287, is very similar to the foregoing. The laws of Kentucky allow municipal corporations to grant rights of way over the public streets and alleys only on condition that the use of the easement shall not obstruct or "unreasonably" impede the passage of persons or vehicles. The city of Frankfort granted to a railroad company the right to construct and operate its road through an alley only 16 feet wide for a distance of 400 feet. It was held that the construction and operation of the road should be enjoined. The court says: "Now, it is an undisputed fact that the alley is not wide enough to admit the passage of appellees' cars and the wagons of persons hauling through the alley at the same time; that the running of cars through the alley stops the passage of wagons through it for the time being, and this will occur at least three or four times a day, and oftener if the appellees choose. It is true that the public, when the right of way is legally granted to railways

through streets, etc., must submit to any inconvenience, not unreasonable, that may be caused in consequence of the reasonable use of the privilege granted. But the public are entitled to the reasonable use of the public streets and alleys for their ordinary travel; but where the grantee of the privilege is empowered to use the privilege when he pleases, and as often as he pleases, and every time he uses it such use totally obstructs, for the time being, though not long at a time, the ordinary public travel along the street or alley, the grant in such case is unauthorized. See *Railroad Co. v. Applegate*, 8 Dana, 294; *Cosby v. Railroad Co.*, 10 Bush. 288; *Ruttles v. City of Covington*, 10 S. W. Rep. 644."

See, also, *Dooley Block v. Salt Lake Rapid Transit Co.*, 8 Am. R. R. & Corp. Rep. 327.

3. Street railway not an additional servitude.— This is held in the case of *Elfelt v. Stillwater St. R. Co.*, 53 Minn. 68; 55 N. W. Rep. 116. It is said: "This court has always recognized the distinction between an ordinary commercial railway and a street railway, in respect to laying them upon a street. The former imposes an additional servitude upon the street, while the latter, being only a mode of using the street for legitimate street purposes, does not." See 6 Am. R. R. & Corp. Rep. 815, et seq.

4. Ejectment by the owner of the fee.— The fee simple of land used as a public highway belongs to the abutting owners, subject to the public right of way, and the possession thereof may be recovered in ejectment by the owner against a railroad company appropriating the same to its permanent use without legislative grant, express or implied. *Louisville, etc., R. Co. v. Liebfried*, 92 Ky. 407; 17 S. W. Rep. 870. Mere acquiescence in the construction and operation of a railroad in a public highway until it becomes a common carrier will not prevent the abutting owner from recovering possession of the highways as against the railroad company. *Railroad Co. v. Allen*, 113 Ind. 581; 15 N. E. Rep. 446, disapproved. *Ibid*.

5. Authority to lay tracks in street does not authorize its use as a switch yard.— Authority granted to a railroad company to lay its tracks and switches in a public street does not carry the right to use such street as a place for making up trains, nor as a depot for cars, nor for receiving or discharging freight. *Owensborough & N. R. Co. v. Sutton*, (Ky.) 13 S. W. Rep. 1086.

6. The grant of authority by a city does not render it liable for damages.— The fact that a city authorizes the construction of a railroad on its streets in accordance with its charter, the injury to property abutting on such streets to be first ascertained, and compensated for in the manner provided for compensating injuries arising from regrade of streets, does not relieve the railroad company from liability for such injury, and impose it on such city. *Hatch v. Tacoma, O. & G. H. R. Co.*, 6 Wash. 1; 32 Pac. Rep. 1068.

7. Permanently obstructing street, at a distance from plaintiff's property — right to compensation.— The defendant company constructed its road across plaintiff's real estate, and permanently obstructed a public street upon which the property abuts at a distance of several hundred feet from the premises. Held, that the owner could maintain a suit at law for the damages sustained by reason of the closing of the street. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240; 51 N. W. Rep. 842.

8. Power of city to revoke authority to occupy street.—Under the Civil Code of California, section 465, conferring authority on railroad companies to lay their tracks on any highway or street subject to the condition of section 470, that the right to do so within any incorporated city or town must be granted by a two-thirds vote of the municipal authority from which the right must emanate; held, that where such right is granted, it is not revocable at the mere pleasure of the board, but there must be failure on part of the road to comply with the terms of the grant before the privilege can be recalled. *Town of Arcata v. Arcata & M. R. Co.*, 92 Cal. 639; 28 Pac. Rep. 676. Compare *Lake Roland El. R. Co. v. Mayor, etc., of Baltimore*, 7 Am. R. R. & Corp. Rep. 619; and *Mayor, etc., of City of Houston v. Houston City Street R. Co.*, 6 Am. R. R. & Corp. Rep. 106.

GARRETT V. LAKE ROLAND EL. RY. CO.

(Court of Appeals of Maryland, June 19, 1894.)

1. RAILROADS IN STREETS. DAMAGE TO ABUTTING PROPERTY BY CAUSEWAY IN STREET NOT A TAKING. The defendant railroad company built a causeway about fifteen feet wide in the center of a street, to form the approach to a bridge by which the railroad was carried over another railroad. The causeway was of masonry and left less than ten feet between it and the curb. It was nine feet high at the bridge and declined to the grade of the street. Plaintiff owned lots abutting on the street opposite, but did not own the fee of the street. Held, that the interference with access and other injury to plaintiff's property did not constitute a *taking* thereof within the meaning of the Constitution.

2. INJUNCTION TO PREVENT CONSTRUCTION UNTIL DAMAGES PAID. Where by law the railroad company was made responsible for injuries to private property in such case, and the act further provided that, if any judgment for such damages should remain unpaid for sixty days, all rights of the company should cease and be in abeyance until the judgment was paid, it was held that there was an adequate remedy at law for securing the abutter's rights and that the construction of the causeway would not be enjoined.

8. AUTHORIZED STRUCTURES IN STREET NOT A NUISANCE. The causeway and abutment having been built under legislative authority are not a nuisance.

BILL by Robert Garrett against the Lake Roland Elevated Railway Company. From a decree for defendant plaintiff appeals.

Argued before ROBINSON, Ch. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE and BOYD, JJ.

Wm. F. Frick, John K. Cowan and E. J. D. Cross, for appellant. *I. N. Steele, J. E. Semmes and F. K. Carey*, for appellee.

McSHERRY, J. This case was argued during the last October term, and then, by direction of the court, it was reargued at the present April term. Upon both occasions the discussions at the bar displayed great research and signal ability, and the briefs show unusual care, skill and thoroughness in their preparation. After several consultations a majority of us have reached the conclusions which, having first briefly stated the material facts, we will proceed to announce.

The appeal is from a decree dismissing the appellant's bill of complaint filed by him in the Circuit Court of Baltimore city against the Lake Roland Elevated Railroad Company. The record shows that Mr. Garrett is the owner of certain unimproved lots situated on and bounded by the west side of North street, and fronting 436 feet thereon, and lying between the north side of Eager street and the south side of Chase street, in Baltimore city. He also owns other lots, likewise fronting on the west side of North street, between Chase and Biddle streets, but with these we are not now concerned. North street is sixty feet wide between the building lines and thirty-six feet between the curbs, and no part of it is included within the outlines of Mr. Garrett's deed. By section 5 of Ordinance No. 23, approved April 8, 1891, the North Avenue Railway Company (one of the several roads by the consolidation of which the Lake Roland Elevated Railway Company was formed) was authorized to bridge the Northern Central Railway Company's tracks on North street, by means of an elevated structure, extending, including the necessary approaches thereto, along North street from the corner of that and Eager streets to the corner of North and Saratoga streets. A stone abutment, forming an inclined plane, to carry on its perpendicular or highest side the iron superstructure, and to serve, on its surface, as the northern approach to the elevated road, has been erected nearly in the center of North street, between Chase and Eager, directly in front of part of the first-named lots of Mr. Garrett. It is eighty-three feet and two and one-half inches in length and fifteen and eight-tenths feet in width, and starts at the street grade, and gradually rises to a height of nine feet, and leaving a distance or driveway between its western face and the curb line, contiguous to Mr. Garrett's property, of nine feet and eight and one-fourth inches. It is alleged that the construction of this

abutment of solid masonry in the bed of North street and the elevated structure will, by reducing the width of the street in front of the appellant's lots to less than ten feet, destroy the access to his property from North street, and prevent him from reaching the same with vehicles ordinarily used in Baltimore. It is charged that the destruction of his right of access to his property as aforesaid renders such property entirely unsalable, and deprives him of the market value thereof, and constitutes, in fact and in law, a taking of his property without making compensation therefor as required by the Constitution of the state of Maryland. It is further claimed that this structure deprives the premises of light and air, and that this, too, is a taking of the property, within the prohibition of the Constitution. It is averred that the mayor and city council of Baltimore, and the general assembly of the state, had no power to authorize the construction of the said abutment or to permit the operation of the road thereon, because these acts create a new and additional servitude upon the street, and upon the appellant, as an abutter thereon, and are a nuisance. It is likewise insisted that Ordinance No. 23 and the act of assembly of 1892 (Chap. 112), confirming that ordinance, are in conflict with section 40 of article 3 of the Constitution, and void. The bill prays for an injunction to restrain the completion of the abutment, and a mandatory injunction requiring the appellee to demolish and remove so much of it as had then been built. The appellee answered the bill, and considerable evidence was taken.

The proposition distinctly presented by the record, and earnestly contended for by the appellant's distinguished counsel, is that the erection by the appellee of this abutment on property not owned by the appellant, but in the bed of a public city thoroughfare, upon which his lots abut, destroys the access to his land, interferes with light and air, imposes a new and additional servitude upon his property, and deprives him of the benefit of the use of the same, and amounts in law to a taking of his property that is in fact not trespassed upon or touched — is illegal until compensation shall have been first made therefor. Though there has been no physical invasion of the appellant's property, still, if the act complained of constitutes, by reason of its consequences,

a taking of the appellant's private property for a public use, within the meaning of section 40 of article 3 of the Constitution of Maryland, which prohibits the taking of private property for public use, except upon just compensation being first paid or tendered, then the injunction should have been granted. But if, on the contrary, this was not such a taking as the Constitution has reference to, and injury has been done the appellant, then his remedy is in another and a different forum ; and the ninth section of the ordinance heretofore alluded to makes ample provision for the prompt and effective enforcement of such judgment as a court of law, in an appropriate proceeding, may pronounce.

That there was no actual appropriation of or entry upon a single foot of the land contained within the outlines of the appellant's deed is admitted, and could not be denied ; and, therefore, to support the theory of the bill, the consequences which it is asserted will result to the appellant from the occupancy by the railway of contiguous land, forming part of the bed of a highway, and owned by some one else, but subject to an easement in the public, and which consequences are not physical invasions of the plaintiff's soil, nor an ouster of him therefrom, are treated by the appellant as a taking of that which is confessedly neither encroached upon nor used at all. The consequential damages resulting from the act complained of — the incidental injuries to the owner — are thus charged to be a taking of private property for a public use, though the property itself remains unappropriated and unapplied to that use in any way whatever. While the Constitution of the state has prohibited the taking of private property for public use without compensation being first paid or tendered, it has not undertaken to define or declare what shall be a taking, within its terms. True, there is some conflict among adjudged cases as to what amounts to such a taking, but the overwhelming weight of authority accords with the conclusions which this court announced in two cases that will be fully referred to later on. Apart from the decisions of the Supreme Court of Ohio (see *Crawford v. Delaware*, 7 Ohio St. 460), which rest upon a doctrine peculiar to that state, and the recent New York decisions in the *Elevated Railway* cases (*Story v. Railroad Co.*, 90 N. Y. 122 ; *Lahr v. Railway Co.*, 104 N. Y. 268 ; 10 N. E. Rep. 528), which are hopelessly in conflict with the principles

announced in other cases in the same state (*Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Forbes v. Railroad Co.*, 121 N. Y. 505; 24 N. E. Rep. 919), and the decisions in Minnesota (*Adams v. Railroad Co.*, 39 Minn. 286; 39 N. W. Rep. 629; *Lamm v. Railroad Co.*, 47 N. W. Rep. 455), and a few cases in Mississippi (*Theobald v. Railway Co.*, 66 Miss. 279; 6 South. Rep. 230), and possibly one or two other states — all substantially following the New York Elevated Railway cases — there is practically an unbroken current of adjudged cases broadly and clearly marking and defining the difference between an incidental injury to, and an actual taking of, private property. An injury to and a taking of such property are distinct things. Every taking involves an injury of some kind, though every injury does not include a taking. "Property is taken by an entry upon and appropriation of it, as in the ordinary case of location. It is injured by obstructing access, as in *Duncan's case* (5 Atl. Rep. 742), or drainage, as in *Ziemer's case* (17 Atl. Rep. 187)." *Jones v. Railroad Co.*, (Penn. Sup.) 25 Atl. Rep. 137. In *Northern Transp. Co. v. Chicago*, 99 U. S. 635, the court said: "Persons appointed or authorized by law to make or improve a highway are not responsible for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country. *Plate Manufacturers v. Meredith*, 4 Term R. 794; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowther*, 2 Barn. & C. 703; *Green v. Borough of Reading*, 9 Watts, 382; *O'Connor v. Pittsburgh*, 18 Penn. St. 187; *Callender v. Marsh*, 1 Pick. 418; *Smith v. Washington City*, 20 How. 135. * * * The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the Constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision." And this was affirmed in *Chicago v. Taylor*, 125 U. S. 161; 8 Sup. Ct. Rep. 820. The constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only

indirectly or consequently injured. *Railroad Co. v. Larson*, (Kan.) 19 Pac. Rep. 661; *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727; *Heiss v. Railroad Co.*, 69 Wis. 555; 34 N. W. Rep. 916; *Railroad Co. v. Heisel*, 38 Mich. 62; *Crosby v. Railroad Co.*, 10 Bush. 289; *Dorman v. City of Jacksonville*, 13 Fla. 545; *Bradley v. Railroad Co.*, 21 Conn. 308; *Spencer v. Railroad Co.*, 23 W. Va. 407; *Richardson v. Railroad Co.*, 25 Vt. 465; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 2 Sup. Ct. Rep. 719.

This distinction between consequential damages and an actual taking, thus firmly settled, was frequently severe in its results, particularly when the power of eminent domain had been exercised by municipal corporations; and, with a view of relaxing its rigors to some extent, many of the states of the Union changed their organic law so as to require compensation to be made for incidental injuries, precisely as though there had been a physical taking of the property. Thus, the Constitution of Pennsylvania, of 1873, and of Alabama, of 1875, provide that, when private property is taken for public use, just compensation shall be made for the property taken, injured or destroyed; that of Arkansas, of 1874, that private property shall not be taken, appropriated or damaged; that of Illinois, of 1870, West Virginia, of 1872, Missouri, of 1875, Colorado and Texas, of 1876, Georgia, of 1877, and California, of 1879, that it shall not be taken or damaged. *Selden v. City of Jacksonville*, (Fla.) 10 South. Rep. 457. Such changes would have been wholly unnecessary if the view of the appellant as to what constitutes a taking of private property had prevailed. But the immunity which protects from liability governmental agencies, in the proper and skillful performance of their public functions, does not extend to private persons or mere quasi public corporations; and, therefore, while in both instances the same distinction between an actual taking of private property and consequential injuries to it when not taken is applicable, a private person or a quasi public corporation is liable in damages to the individual incidentally injured, though the act complained of, and occasioning the injury, was in itself lawful. Hence, for such injuries as are complained of here, though they do not amount to a taking of property, if found to exist, there is a remedy in a court of law. *Railroad Co. v. Reaney*, 42 Md. 117.

The ninth section of the ordinance authorizing the construction of the abutment and the elevated road expressly provides that, if any judgment recovered against the company for such injuries as are here complained of shall remain unpaid for sixty days, "all the rights" of the company under the ordinance "shall cease and be in abeyance until the judgment shall be paid," and the right to operate the road "shall only be revived after the payment thereof." In the case of *Mayor, etc., v. Willison*, 50 Md. 148, the distinction between consequential injuries and an actual taking of property was considered; and it was distinctly held that damages done to a water power of a mill by means of an increased flow of water carrying debris into the race, caused by the grading and paving by the city of one of its public streets, was not a taking of property. "Property thus injured is not, in the constitutional sense, taken for public use." *Id.* And again, in *O'Brien v. Railroad Co.*, 74 Md. 363; 22 Atl. Rep. 141, the question now before us was directly presented. There the plaintiff was an abutting owner on the east side of Howard street, in Baltimore city, with no freehold or leasehold estate in the bed of the street; and he claimed that by reason of his abutting proprietorship he had such an interest in the streets as to entitle him to compensation, according to the provisions of article 3, section 40, of the Constitution, for the injury occasioned him by the act of the railroad company in constructing its road in an open cut on the west side of Howard street and opposite his property. Because he had not been paid or tendered compensation he filed a bill in equity praying for an injunction to restrain the construction of the open cut. The precise question for the determination was "whether the use of the street by the railroad company in the manner proposed, and under the conditions stated, would be such taking of private property of the plaintiff as is forbidden by the Constitution of this state, except upon payment of just compensation first being made," and in the course of the opinion it was said: "But, notwithstanding the railroad company may be liable on common-law principles, the question still remains to be answered, will the cutting and use of the street, as proposed by the railroad company, be the taking of private property, in respect of the rights of the plaintiff, as abutting lot owner, within the meaning of the Constitution? As already stated, it is not charged that there will be

any invasion of or physical interference with any part of the plaintiff's lot, in the construction of the road. The most that he claims for is that he will be deprived of the full use of the street, as it now exists, and that his property will be depreciated in value by the construction of the road. This, however, is but an injury, to whatever extent it may be suffered, of an incidental or consequential nature. * * * In such case as this, therefore, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the Constitution of the state, and hence there is no ground for any preliminary proceeding by way of condemnation."

We must either adhere to these two decisions in 50 Maryland and 74 Maryland, 22 Atlantic Reporter — strictly in accord, as we have shown them to be, with the decided weight of judicial opinion on this subject — or else, receding from them, adopt the Ohio or the New York doctrine. We see no reason for departing from, or for modifying, our former deliberate judgments. The Ohio doctrine is peculiar to that state alone (*O'Connor v. Pittsburgh*, supra; *Northern Transp. Co. v. Chicago*, supra), and is so admitted to be in *Crawford v. Delaware*, supra. The New York doctrine involves this inextricable dilemma, viz.: If the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken, in the constitutional sense; but if a railroad company, in lawfully constructing its road, does precisely the same thing that the city did in grading the street, then the abutter's property is taken, though not physically entered upon at all. "The house and lot are the same; the street is the same; the acts done are the same; the use for which they are taken is a public use, in each case; and yet the court must hold that there is a taking of property in one case, and not a taking of property in the other." Mr. Cowen's brief in *O'Brien's case*, supra. The abutment and elevated structure, having been built under legislative authority, are not a nuisance. *O'Brien v. Railroad Co.*, supra. "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes." *Northern Transp. Co. v. Chicago*, supra. "It may be stated, as a general rule, that whatever is authorized by statute, within the scope of legislative powers, is lawful, and, therefore, cannot be a nuisance." 2 Wood

Ry. Law, 970. The structure is, therefore, a lawful one. It does not destroy the street, as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and the other injuries complained of are purely incidental and consequential, though the appellant is not without a remedy therefor. While it is stated as a general rule that no action will lie by an abutting lot owner — who does not own the fee in the street — for injuries which merely result from the legal and reasonable use of a public street by a railway company, and which leaves his right of egress and ingress reasonably sufficient (*Railroad Co. v. Bingham*, [Tenn.] 11 S. W. Rep. 705), still the statute law of Maryland, and the ordinance to which we have alluded (and the terms of which the appellee has accepted), provide an ample remedy for all such damages as the appellant may be able to show he has sustained. The North Avenue Railway Company (one of the corporations forming the Lake Roland Elevated Railway) was incorporated under article 23 of the Code; and section 169 of that article holds every railroad company laying its tracks upon any public street responsible for “injuries done to private property,” lying upon or near to such street, “by such location,” and the damages thus occasioned may be recovered by civil action. Section 9 of Ordinance No. 23, already referred to, makes the payment of such damages, when judicially ascertained, absolutely certain, or suspends the operation of the road.

Upon a full and most careful consideration of the whole case, we are of the opinion that the decree dismissing the bill of complaint was properly passed, and it will, therefore, be affirmed. Decree affirmed, with costs above and below.

BRYAN, J. (dissenting). Robert Garrett is the owner in fee simple of a lot of ground in the city of Baltimore, situated on the west side of North street, between the north side of Eager street and the south side of Chase street, fronting about 436 feet on North street, with a depth of 168 feet westerly to Hunter alley. He also owns in fee another lot on the western side of North street, with a frontage thereon of about 356 feet, and running back westerly about 168 feet to Hunter alley, and extending from the north side of Chase street to the south side of Biddle street. He

does not own the fee in the bed of North street. The Lake Roland Elevated Railway Company has erected on North street a stone abutment in front of the first-mentioned lot. This abutment is eighty-eight feet long and fifteen feet and eight-tenths wide, and is distant about nine feet and eight inches from the curb line on the western side of the street. It commences at grade at the northern end, and ascends, as an inclined plane, until it reaches the height of nine feet at its highest point. It is distant about ten feet six inches from the curb line on the eastern side of the street. North street is a public highway, having a width of thirty-six feet between the curb lines on the opposite sides of the street. The stone abutment above mentioned was erected shortly before the commencement of proceedings in this case. Since that time an iron superstructure has been placed upon it, for an elevated railroad. Garrett filed a bill in equity for an injunction to restrain the Lake Roland Company from placing its elevated railroad structure on the abutment, and praying for its demolition and removal, and for general relief. The Lake Roland Company claims the right to erect this abutment under the authority of an ordinance of the mayor and city council of Baltimore. The court below dismissed the bill of complaint.

Before we examine the ordinance, let us inquire what are the rights of the complainant, independently of its provisions. When North street was opened two-thirds of the expense of its construction was assessed upon the property benefited by the opening of the street. The existence of the street enhanced the value of the coterminous property, and the proprietors were required to pay the price of this enhancement by contributing two-thirds of the expense of the improvement. They paid for something quite distinct from the rights which all other inhabitants of the city had in the street. They, of course, had the same right of using the street as belonged to the general public, but, beyond and in addition to this right, they acquired great advantages and conveniences by having a wide public street in front of their lots of ground. These advantages and conveniences were bought and paid for, and the money was paid for the purpose of increasing the value of their property. These advantages and conveniences, comprising, among other things, facility of access, adapted the ground to those uses for which, in a large city, it is most desirable. Ordi-

nance No. 23 of the mayor and city council of Baltimore, approved April 8, 1891, authorized the construction of an elevated railway by the corporation to whose rights the Lake Roland Company has succeeded. The fifth section of this ordinance enacted that the said corporation should have the power to bridge the tracks of the Northern Central Railway Company from the corner of Eager and North streets to the corner of Saratoga and North streets, and to make the proper and necessary elevated structure for the purpose of effecting said crossing and the approaches thereto. This ordinance has been ratified and confirmed by the act of 1892 (Chap. 112). We may assume, for all the purposes of this discussion, that the structure in question has been erected in conformity with the requirements of the ordinance. Its effect upon the condition of the street is very obvious. It very seriously impedes travel and transportation. And, with respect to the complainant, it erects an impassable barrier in front of a portion of his property, and takes away from it the value derived from a frontage on an open public street thirty-six feet wide. The available space is reduced to about ten feet. We do not, at present, find it necessary to make an estimate of the damage thus inflicted. The testimony shows it to be very great. If this structure had not been authorized by legislative authority, it would have been a public nuisance of an aggravated character; but, as a matter of course, it cannot be so regarded after it has received the sanction of the general assembly and the mayor and city council of Baltimore. Private rights, however, are not affected by any legislation which has taken place. They are amply secured against infringement by the declaration of rights. According to the nineteenth article, "every man, for any injury done to him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right * * * according to the law of the land." And the twenty-third article declares that "no man ought to be * * * deprived of his life, liberty or property but by the judgment of his peers, or by the law of the land." The legislature has paramount authority over all public highways, and may direct the mode in which they are to be used. It has seen fit to confer on the mayor and city council of Baltimore the

power to regulate the use of the streets in that city. But it has never been supposed that either the legislature or the mayor and city council could exempt a private corporation from responsibility for any wrongs done in using the streets under their authority; and no such proposition has been maintained in the argument of this case. When the city, in the exercise of its corporate powers, proceeds to close a street, it is required to ascertain, by due process of law, the amount of damage which will be done by closing it, and to pay over to each one who is injured the amount he is entitled to receive, or invest it in city stock for his benefit, before the street is closed. Pub. Local Laws, art. 4, § 806. In this way those persons are indemnified who, by the closing of a street, are deprived of the advantages, conveniences and valuable legal rights dependent on its existence as a public highway. It is true that North street has not been closed by the proceedings in this case. But other injuries are to be redressed by the remedies which the law has prescribed as appropriate to their particular circumstances. Where a railroad company had a right to make a tunnel in a street, and, in the careful exercise of this right, it damaged the walls of a house, it was held that the owner of the house was entitled to recover compensation for the injury, even although it were the natural or inevitable consequence of the act which was authorized by law. *Reaney's Case*, 42 Md. 117. In the present case the abutment, to the extent of its dimensions, subverts and destroys every possible use for which a street is intended. It obstructs the access to the property adjacent to it, and makes it impossible for the owner to use it in the manner in which he has a right to use his property. The street, for a distance of eighty-eight feet, has disappeared, and a narrow alley has been substituted in its place. Now, admitting this to be an injury which must be redressed, the inquiry is, what remedy has the law declared to be appropriate to such a case? If the ordinance and the ratifying statute cannot exempt the Lake Roland Company from responsibility for injuries committed, it must follow as a consequence that it is liable to the same proceedings as any other wrongdoer under similar circumstances. The appropriate remedy for obstructing a right of way is an injunction to remove the obstruction. This was clearly decided in *White v. Flannigain*, 1 Md. 525. In general terms, the rule in equity is stated to be that an injunc-

tion will not be granted "when a trespass is fugitive and temporary, and adequate compensation can be obtained in an action at law." But the rule does not imply that, where a trespasser is destroying the property of another person, equity will refuse to interfere because the value of the property might be recovered in an action at law. Every man is entitled to the use and enjoyment of his property in any lawful manner which suits his wishes and purposes ; hence, there is a necessary limitation or explanation of the general rule. An injunction will be issued where the trespass reaches to the substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed, or where it would impair the just enjoyment of it in the future. *White v. Flannigain*, 1 Md. 545 ; *Shipley v. Ritter*, 7 Md. 413-415 ; *Story Eq. Juris.* § 928.

In *White v. Flannigain* it was said : " We have seen that the complainant is entitled under an implied covenant to a right of way over the forty-five foot street. Any obstruction which denies the exercise and use of this right, works irreparable mischief to the street, as a street. The thing ruined by the obstructions is a street, and, as in the case of the mine, the complainant, on the principle there recognized, has a right to the aid of a court of equity. What he complains of is the destruction of the street. He is entitled to the enjoyment of it as a street." In *Corning v. Lowerre*, 6 Johns. Ch. 439, a bill was filed for an injunction to restrain the defendant from obstructing Vestry street, in the city of New York, averring that he was building a house upon it, to the great injury of the plaintiffs, as owners of lots on and adjoining that street. Chancellor KENT granted the injunction, saying that it was " a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs." Of course, in the present case, the complainant cannot maintain that the obstruction is a public nuisance, but he is entitled to protection against " a special grievance affecting the enjoyment of his property, and the value of it." In *Hart v. Buckner*, in the United States Court of Appeals for the fifth circuit, reported in 2 U. S. App. 488 ; 5 C. C. A. 1 ; 54 Fed. Rep. 925, the court say : " Owners of lots abutting on and adjacent to a public street of a city, even if

not owners of a fee in the street, have the right of access and the right of quiet enjoyment; and such rights are property which may be protected by injunction, when invaded without legal authority." From many other cases illustrating this point, we will select two from the Supreme Court of the United States. In *Railroad Co. v. Schurmeier*, 7 Wall. 272, the complainant alleged that the railroad company was constructing a railroad track over and along a public street, levee and landing in front of certain real estate in the city of St. Paul, belonging to him, and that the purpose was to run cars thereon for the transportation of freight and passengers, and that if this purpose should be carried into effect the street, levee and landing could not be occupied and used for the purposes for which they were constructed, and to which they were dedicated, and that his premises would be rendered useless and valueless. The railroad company denied that Schurmeier was the owner of the fee in the street, and set up title in itself, as grantee of the state of Minnesota. It was shown in evidence, among other things, that the person under whom Schurmeier claimed title had, by certain formal proceedings, dedicated to the public the street, levee and landing; and it was contended that thereby, under the laws of Minnesota, the entire fee was vested in the state. It was also shown that the city of St. Paul claimed entire control over the said premises, and had established a grade for the same. In reference to the statute which was alleged to vest the fee in the state the court said: "Suppose the construction of that provision, as assumed by the respondents, is correct. It is no defense to the suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party in making the dedication. They could not, nor could the state, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant." It was decreed that the railroad company should be enjoined from the further prosecution of its work, and that it should remove from the street, levee and landing in front of Schurmeier's premises all tracks, trestle works, buildings and obstructions of every kind which it had constructed for railroad purposes. In *Barney v. Keokuk*, 94 U. S. 324, it appeared, among other things, that a

railroad company had erected in Water street, in the city of Keokuk, a permanent and substantial building, and that it covered the whole of the front of the plaintiff's lots bounding on the street. The Circuit Court decided that the railroad company had acquired from the municipal authorities a right to lay down their tracks in the street, but the assent of the municipality could not confer the right to erect this building in the street. The Supreme Court said: "The construction of a permanent freight depot in Water street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage; and this, as we have said, cannot be created or allowed. It is subversive of, and totally repugnant to, the dedication of the street, as well as to the rights of the public."

It may be said that in this case the complainant is not entirely deprived of the use of the street. This is true. But there is a very serious impediment to the use of the street by vehicles, although the obstruction is not total. A solid stone structure, eighty-eight feet long and about sixteen feet wide, ascends from the grade of the street to a height of nine feet. Before its erection there was an open street in front of Garrett's lot measuring thirty-six feet from curb to curb. The open space in front of his lot has been so much reduced that it measures less than ten feet. He is not deprived of all use of his lot, but he is prevented from the advantageous use of it which he has a right to make, and upon which its value very largely depends. It cannot be said that his property has been destroyed; but, in the language of the authorities, the injury reaches to the very substance and value of the estate, and goes to the destruction of it, in the character in which it has been enjoyed, and it impairs the just enjoyment of the property in the future. This last circumstance is one of the tests given by Judge STORY to determine the propriety of an injunction. STORY Eq. Juris. § 928. If an individual should blockade the access to the plaintiff's lots, and say to him, "You may sue me for damages, and recover full compensation for the injury which I have done to you," a court of equity would not tolerate such an excuse for the trespass, but order the removal of the obstruction. In whatever way the city council may authorize the public use of the streets for railway purposes, it can in no manner diminish or disparage private rights in connection with them.

These are under the protection of the law of the land, and any invasion of them must be redressed by the ordinary process of the tribunals of justice. It is not competent for the city council, with or without the sanction of the legislature, to debar an injured party from a resort to the ordinary remedies provided by the law of the land for the protection of property, and to restrict him to an action for damages. If any such effect be attributed to the ninth section of the ordinance of the mayor and city council of April 8, 1891, it must be determined that for such purpose it is simply void. In *O'Brien v. Railroad Co.*, 74 Md. 363; 22 Atl. Rep. 141, it was decided that, as there had not been a physical invasion of the property of the complainant by the railroad company, there was no taking of private property, within the meaning of the Constitution, and that, therefore, there was no ground to require a condemnation before proceeding with the work of the railroad. The complainant was the owner of property abutting on a street in which the railroad company was making a cut so as to provide an entrance to a tunnel which it was authorized to construct. The injury to the complainant was not regarded as serious. It would not, therefore, according to the principles above stated, have justified an injunction. Let us quote the language of the court: "It is not charged, or in any way claimed, that the plaintiff will be deprived of, or seriously injured in, the right of access to his property from the street, by the making of the cut. * * * The street, after the cut is made, will still remain in front of the plaintiff's property on the east side of the cut, about forty-one feet wide. There is no question, therefore, presented here as to the right of the plaintiff to compensation for obstructing access to his property from the street." Page 371, 74 Md., and page 141, 22 Atl. Rep. This passage shows a marked difference between that case and the present one.

I see nothing to defeat the complainant's right to such relief as a court of equity is able to give him, unless he has lost it by delay in instituting these proceedings. The evidence does not show the precise time at which the abutment was completed; but the plans for the elevated road were approved by the city commissioner July 28, 1892, and the bill of complaint was filed November fifteenth of the same year. The superstructure was placed on the abutment after the filing of the bill. There could

not have been much delay on the part of the complainant in instituting these proceedings; certainly, not so much as would defeat his right to relief on the ground of laches, or acquiescence in the construction of the abutment. The usual course would be to decree a removal of the obstruction, and this ought to be done in the present instance, if it were necessary for the protection of the complainant's interest. But a court of equity, in the exertion of its powers, is always governed by a benignant sense of justice, and never, even in the redress of wrongs, inflicts needless injury. The removal of the abutment would prevent the Lake Roland Company from making efficient use of its road, and would cause incalculable damage to its business. We ought, therefore, to forbear to order the removal, if it will repair the injury which it has produced. It has been often said that the granting or refusing an injunction is a matter resting in the sound discretion of the court. This may perhaps be considered rather a vague statement. But, however, in exercising this jurisdiction, the courts take into view all the facts affecting the rights of the parties concerned, and frame their decisions in such manner as to do complete justice between them. They may grant an injunction on terms, and they may dissolve it on terms. We do not fail to see that in this case a rigid application of abstract rules of procedure would do more injustice than it would remedy. But, by reason of the plastic character of equity practice, we are enabled to mould our decree in this case in such manner as to attain substantial justice. A notable instance in which the relief was modified to suit the circumstances of the case may be found in *Green v. Drummond*, 31 Md. 71, although it was entirely different from that prayed in the bill of complaint. A bill in equity was filed for the specific performance of a contract for the purchase of real estate. The court decided that specific performance could not be decreed, but, nevertheless, as the complainant had expended money on the faith of the contract, it decreed him pecuniary compensation. The complainant contends that the Lake Roland Company has no right to deprive him of the means of access to his property, and of the other benefits of the street, without first making him compensation, to be agreed upon between them, or to be ascertained by condemnation under the right of eminent domain. According to the decision in *O'Brien*

v. Railroad Co., we cannot sustain his position that this is a case for the exercise of the right of eminent domain. If, however, there had been a condemnation of this kind, he would have been awarded a sum of money sufficient to compensate him for the rights taken from him. If we render a decree in his favor for this amount, we will satisfy the demands of justice as fully as we are able to do under the circumstances of this case. We ought, therefore, to compute from the evidence the amount of the damage which has been done to him, and decree that the Lake Roland Company shall pay this sum to him. If it shall not be paid within ninety days, we ought to order the abutment to be removed.*

1. Railroads in streets — injury to abutting property by a change of grade, or the construction of embankments, causeways and the like, for the accommodation of, or in connection with, the laying of a railroad in the street.—In the principal case a causeway about sixteen feet wide was built in the center of a street, in front of the plaintiff's property, so as to leave less than ten feet on either side between the causeway and the curb. The causeway was built by the defendant railroad company as an approach to a bridge over the tracks of another railroad, and for the purpose of avoiding a dangerous grade crossing. See *Koch v. North Ave. R. Co.*, 75 Md. 222; 23 Atl. Rep. 463; 6 Am. R. R. & Corp. Rep. 319, note 12. The causeway and bridge appear to have been for the exclusive use of the railroad company. There does not appear to have been any change of grade of the street or any part of it. The plaintiff did not own the fee of the street.

Although the abutting owner does not own the fee of the street, he has certain rights or easements therein, the principal of which are known as the easements of light, air and access. 6 Am. R. R. & Corp. Rep. 252, note; *Henry Gauss & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 7 Am. R. R. & Corp. Rep. 235; *Dooley Block v. Salt Lake Rapid Transit Co.*, 8 Am. R. R. & Corp. Rep. 327. These rights are subordinate to the right of the public to use and improve the street for all the legitimate purposes of a highway or street. *Ibid.*; *Selden v. City of Jacksonville*, 28 Fla. 558; 7 Am. R. R. & Corp. Rep. 73, note 2. These rights are property, and, if they are interfered with or destroyed for public use, there is a *taking* within the meaning of the Constitution. *Lewis Em. Dom.* §§ 53–56. In the principal case there was an interference with access to the plaintiff's property and perhaps an obstruction of light and air, which resulted in a serious damage or diminution in value. Whether there was a *taking* depends upon whether his *rights* were interfered with, and this depends upon whether the work in question was in furtherance of the legitimate uses of the street or otherwise. Now we take it as settled that a railroad is not a legitimate street use unless it is a street passenger rail-

* Reported in 29 Atl. Rep. 830.

way, and not then, unless it is constructed upon the surface or established grade of the street. See note to next case; also 6 Am. R. R. & Corp. Rep. 299, 315, 335. In the principal case the railroad was apparently a street passenger railway, but it was not constructed upon the surface or established grade of the street, and, therefore, was not, at least as built in front of the plaintiff's property, a legitimate street use. Ibid. It follows that the interference with plaintiff's rights to light, air and access constituted a *taking* of his property.

It is to be observed that the matter at issue in the principal case was not very material to the plaintiff's interests. The question was not, whether he should have any remedy for the damages he had sustained, but whether he should have the particular remedy of an injunction. It was conceded that the defendant was liable for the damages the plaintiff had sustained, and the court held that the law had made adequate provision for their recovery and payment.

Cases very analagous to the principal case in the facts will be found in *Reining v. New York, L. & W. R. Co.*, 5 Am. R. R. & Corp. Rep. 476, and *Rausten v. New York, L. & W. R. Co.*, 7 Am. R. R. & Corp. Rep. 520. The note to the latter case discusses the rights of abutting owners with respect to the elevation or depression of streets for the accommodation of railroad companies. See, also, the next section.

2. Approach to toll bridge occupying middle of street, whether a legitimate street use — whether damage to abutting property thereby is a taking.— The case of *Willamette Iron Works v. Oregon Railway & Nav. Co.*, (Oreg.) 37 Pac. Rep. 1016, is very similar to the principal case in its facts, but directly opposed in its conclusions of law. The defendant was authorized to build a bridge across the Willamette river between the cities of Portland and East Portland, "for the purpose of travel and commerce, as a railroad, wagon road and passenger bridge, and to charge and collect tolls and fares thereon." In pursuance of such authority it constructed a double-decked steel bridge, the upper deck being for ordinary street traffic and the lower for railroad traffic. An approach was constructed to the upper deck, starting upon Third street at G street and extending along the middle of Third street until near H street, and thence reaching the bridge by a curve. The approach was thirty feet wide, and rose from the grade of G street to a height of thirteen and one-half feet at H street. Though built of timbers, it was, practically, a solid structure. The plaintiff's property abutted on Third street and extended from G street to H street. At G street and for most of the distance there was eighteen feet between the approach and the lot line and eight feet between it and the sidewalk. The inference is that plaintiff did not own the fee of the street. The Constitution of Oregon, like the Constitution of Maryland, required compensation for property taken only. The only substantial difference between this and the Maryland case is to be found in the fact that the causeway in the latter case was for the exclusive use of a street railroad, while in the former it was for the use of ordinary street traffic upon payment of toll. The suit was to enjoin the occupation of the street for the bridge approach, and we quote so much of the opinion as discusses the rights of the plaintiff: "But few questions have come before the courts in recent years involving larger pecuniary interests, or of greater practical importance, or which have provoked more discussion, than those

growing out of the enforcement by abutting lot owners of their right to compensation for the occupation and use of streets under legislative or municipal authority by private corporations for public use, under Constitutions like ours, which provide that private property shall not be taken for public use without just compensation. It is quite generally agreed that any proper exercise of governmental power over a street in a municipality, for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking, within the meaning of the Constitution, and will not entitle the adjoining proprietor to compensation, or give him a right of action. Cooley Const. Lim. (5th ed.) 671; *Transportation Co. v. Chicago*, 99 U. S. 535. It is within this principle that changes of grade; the use of a street for a surface street railroad; the erection of lamps, hitching posts, telephone, telegraph and electric light poles; the laying of sewer and water pipes; the crossing of streets over railway tracks by means of elevated viaducts—are, when authorized by lawful authority, held *damnum absque injuria*, although the abutting owner may be seriously injured, and the value and usefulness of his property greatly impaired. This is upon the ground that individual interests in streets are subservient to those of the public, and that an adjoining owner received full compensation for such injury as might result to him or his grantees from the use of the street for proper street purposes at the time of the dedication or appropriation of the land therefor. But there is a limitation to legislative or municipal power over a street, which cannot be exceeded without invading the constitutional rights of abutting owners. An abutting proprietor is entitled to the use of the street in front of his premises, to its full width, as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and, therefore, any impairment thereof, or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking, within the meaning of the Constitution, whether the fee of the street is in the abutting owner or not. He holds his property subject to the power of the proper legislative authority to control and regulate the use of the street as an open public highway, and, hence, any authorized use thereof, though a new one, gives him no cause of action. But such holding is not subject to the legislative power to divert the street from legitimate street purposes by authorizing a structure thereon which is inconsistent with its continuous use as an open, public street. Any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made. *Elliott Roads & St.* 526; *Tied. Mun. Corp.* 301; *Lewis Em. Dom.* § 126; *Booth St. Ry. Law*, §§ 80, 81; 2 *Dill. Mun. Corp.* §§ 711, 712, 723c, *McQuaid v. Railway Co.*, 18 *Oreg.* 237; 22 *Pac. Rep.* 899; *Story v. Railroad Co.*, 90 *N. Y.* 122; *Lahr v. Railway Co.*, 104 *N. Y.* 268; 10 *N. E. Rep.* 528; *Reining v. Railway Co.*, 128 *N. Y.* 157; 28 *N. E. Rep.* 640; *Kane v. Railroad Co.*, 125 *N. Y.* 165; 26 *N. E. Rep.* 278; *Corning v. Lowerre*, 6 *Johns. Ch.* 439; *Barney v. Keokuk*, 94 *U. S.* 324; *State v. Jersey City*, 52 *N. J. Law*, 65; 18 *Atl. Rep.* 586, 696. As said by ANDREWS, J., in *Kane v. Railroad Co.*, *supra*: ‘However difficult it is to trace its origin, or to refer it to any exact legal

principle, it is, undoubtedly, the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in a municipality, has, by virtue of proximity, special and peculiar rights, facilities and franchises in the street, not common to citizens at large, in the nature of easements therein, constituting property, of which he cannot be deprived by the legislature or municipality, or by both combined, without compensation.' And in Story's case, *supra*, the rule is thus stated by TRACY, J.: 'While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open, public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized.' 90 N. Y. 170.

"This brings us to the question, then, whether the occupation of Third street by the approach to defendant's bridge is compatible with or destructive of its use as an open public street. As already stated, this street is about sixty-six feet in width, and the approach complained of is practically a solid structure thirty feet wide in the middle of the street, so that no use can be made of that portion of the street occupied by it except by persons desiring to use defendant's bridge and pay toll therefor. In other words, it is in fact an appropriation of a public street to the exclusive use of a private corporation, and to the manifest injury of an abutting proprietor. The plaintiff and the public are absolutely and permanently excluded from the use of all that portion of Third street covered by the approach for general street purposes. It practically terminates the street as an open public thoroughfare at the north line of G street in place of the north line of H street, as it is laid out and dedicated; and the only roadway in front of plaintiff's property is but a few feet wide, and quite insufficient for the proper and necessary use of such property, or for the accommodation of public travel. While the city authorities undoubtedly have power to authorize the use of the street for legitimate street purposes, we do not think the public can justly demand or require such a sacrifice of private interests, or justify such an exclusive and permanent appropriation of a street in aid of a private enterprise, although for public purposes, as is contemplated in this case. It may be conceded that the general interests of Portland and the public at large are promoted by the appropriation of the street to the purposes of an approach to defendant's bridge; but it by no means follows that the burden of such a public improvement can rightfully be cast upon this plaintiff by appropriating its property for the public benefit, without compensation. We think, therefore, that, while it is competent for the legislature or municipality to authorize the use of a street for legitimate street purposes without making compensation to abutting owners for consequential injuries to their property, they cannot legally authorize structures of the character complained of to be erected thereon for the use and convenience of a private corporation, and which absolutely and permanently exclude the public and the abutting owner from the portion of the street so occupied, without compensating the adjoining proprietor for the injury sustained.

"The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly unten-

able. The city of Portland has undoubted plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public street; and, while such permission included as a consequence the construction of a solid roadway above and over the street surface, it does not follow that what was done was in exercise of the power to alter or change the grade of a street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. The primary object of this grant of power is to enable the municipality to make the streets safe and convenient for public travel, and not to divert them from legitimate street purposes to the exclusive use of some private corporation. Conceding, therefore, that defendant occupies this street by lawful authority, and hence its structure is not a nuisance, yet it invades the legal rights of an abutting owner, and is an appropriation of the property of such owner without compensation, which is beyond the power of the legislature or municipality, or both, constitutionally, to authorize or sanction."

Willis v. City of Winona, (Minn.) 60 N. W. Rep. 814 (1894), is like the Oregon case with two exceptions. An approach to a bridge was constructed in the center of the street in front of plaintiff's property. The approach was twenty-four feet wide and supported on iron columns. The bridge was exclusively for street traffic and was a toll bridge built and maintained by the city. In fact the latter point is the only point of difference from the Oregon case, for the approach in the latter case was not exclusively for street traffic. The Minnesota case holds that the approach was not an additional servitude upon the street and that there was no *taking* of property from the abutting owner. The court says: "Do the construction and maintenance of this bridge approach impose an additional servitude on the street? It can hardly require argument to prove that the bridge itself is a public highway. The fact that tolls are exacted for its use by the public, for the purpose of defraying the expense of its construction and maintenance, in lieu of direct taxation for that purpose, does not change its character as a public highway, so long as all persons are entitled to use it as a public thoroughfare. *Commissioners v. Chandler*, 96 U. S. 205. The bridge is just as much a public highway as is Main street, with which it connects; and, whether we consider the approaches as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can make no difference in principle whether this was done by filling up the

street solidly,* or, as in this case, by supporting the way on stone or iron columns. Neither is it important that the city raised the grade of only a part of the street, leaving the remainder at a lower grade. The facts that it required authority from the United States and the state of Wisconsin, as well as of Minnesota, to empower the city to build a bridge across the Mississippi, or that such bridge extended beyond the city limits, are wholly immaterial, so long as the city kept within the authority conferred upon it. Had the authority been to tunnel under the river, and the approach had been made by cutting down the grade of a part of Main street, the principle would have been exactly the same. The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are exceptions), is that, so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and, hence, is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case fall within it, is too well established by the decisions of this court to require the citation of authorities from other jurisdictions. *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. City of Minneapolis*, 24 Minn. 254; *Henderson v. City of Minneapolis*, 32 Minn. 319; 20 N. W. Rep. 322; *Yanish v. City of St. Paul*, 50 Minn. 518; 52 N. W. Rep. 925. See, also, *Transportation Co. v. Chicago*, 99 U. S. 635; *Selden v. City of Jacksonville*, 28 Fla. 558; 10 South. Rep. 457. The New York Elevated Railway cases cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down (*Story v. Railroad Co.*, 90 N. Y. 184), but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic, was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages. Neither does the *Adams* case, 39 Minn. 286; 39 N. W. Rep. 629, aid the plaintiff, for that case proceeds upon the proposition that the construction and maintenance of an ordinary commercial railway upon a street is the imposition of an additional servitude. Plaintiff also cites numerous cases as to what constitutes a 'taking' of private property. The law of those cases is unquestioned. There is no doubt that the acts of the city would amount to a taking of plaintiff's property, so as to entitle him to compensation, provided the use made of the street by the city imposed an additional servitude upon it, but that is the very question in the case. Our conclusion is that the construction and maintenance of this bridge approach did not impose any additional servitude upon the street, but was a proper street use, and, hence, constitutes no basis for an action in favor of plaintiff for damages."

3. Of the remedy by injunction when the abutting owner's easements in street are interfered with so as to amount to a taking.— On the right to an injunction in such case the court, in *Willamette Iron Works v. Oregon Railway & Nav. Co.*, (Oreg.) 37 Pac. Rep. 1016, the facts of which are stated at length in the last section, says: "As the structure, the maintenance of which is sought to be restrained in this case, is permanent and

exclusive in its character, and, if suffered to continue as now located, will inflict a continuing and permanent injury upon the plaintiff, we think it manifest that it is entitled to restrain the continuation thereof by an injunction; but as it was constructed with the knowledge and without objection by plaintiff, on the assurance, however, of the defendant, that it was only intended as a temporary expedient and not as a permanent structure, and the fact that it has become and is one of the principal avenues across the river, and daily used by a large number of electric cars, wagons and foot passengers, the injunction should not be made mandatory until the defendant has had a reasonable time after the mandate is filed in the court below, to be determined by that court, to acquire the plaintiff's easements in the street, by agreement or by proceedings to condemn the same, if it should be so advised." See, also, *Brown v. Seattle*, 7 Am. R. R. & Corp. Rep. 64, and note, §§ 9-12.

4. **Change of grade of street made necessary by the construction of a railroad across it or along an intersecting street—rights of abutters.**—Plaintiffs owned lots fronting on W. avenue 150 feet from F. street. Defendants lawfully constructed their railroad along F. street, crossing W. avenue. Under direction of the city authorities defendants graded W. avenue in front of plaintiff's premises, as directed by the city engineer, and thereby to some extent obstructed access to said premises. Held, that defendants are not liable to plaintiffs for injuries to their property caused by such grading. *Atchison, T. & S. F. R. Co. v. Arnold*, 52 Kans. 729; 35 Pac. Rep. 780. To same effect: *Atchison, T. & S. F. R. Co. v. Luening*, 52 Kans. 732; 35 Pac. Rep. 801. See, also, *Nicks v. Chicago, etc., R. Co.*, 84 Iowa, 27; 9 Am. R. R. & Corp. Rep. 113, note 1.

BARROWS V. CITY OF SYCAMORE.

(Supreme Court of Illinois, June 19, 1894.)

1. **EMINENT DOMAIN. STANDPIPE IN STREET. RIGHT OF ABUTTER TO DAMAGES.** A city has no right to erect a standpipe in a public street, even though the fee of the street is in the city, since such use of the street is inconsistent with the objects for which streets are established.

2. In an action by a property owner against the city for damages caused by the illegal erection of a standpipe in the street, an allegation that the pipe is liable to fall, and that the fear of its falling injures plaintiff's property, is insufficient to show special damage, where it is not alleged that the pipe is improperly constructed, and no facts are alleged tending to show danger of its falling; but an allegation that it obstructs the light to plaintiff's building is sufficient to show special damage.

ACTION on the case by Sarah J. Barrows against the city of Sycamore. Defendant obtained judgment, which was affirmed by the Appellate Court. 49 Ill. App. 590. Plaintiff appeals.

Jones & Rogers, for appellant. *Carnes & Dunton*, for appellee.

WILKIN, J. This is an action on the case by appellant against appellee, in the Circuit Court of Dekalb county, to recover damages for an alleged injury to real property. The Circuit Court sustained a demurrer to the declaration, and rendered judgment against the plaintiff for costs, from which she appealed to the Appellate Court of the second district, and from a judgment of affirmance in that court prosecuted this appeal.

The cause of action set up in the declaration is that plaintiff is the owner of a certain lot in the city of Sycamore, with a two-story building on the southwest corner thereof, fronting south and west on State and Main streets, which she used and occupied as a residence and hotel; that the city "injuriously, unjustly and wrongfully constructed, or caused to be constructed and erected, at or near the center of the intersection of said streets, and at a distance of about 56½ feet from said hotel building, a standpipe, or water tower," fifteen feet in diameter, and about 135 feet high, having a capacity of 179,000 gallons, made of steel or iron plates, five feet wide, riveted together, the lower course being nine-sixteenths of an inch thick, and those above diminishing to the upper course, which was three-sixteenths of an inch. This structure is alleged to have caused an injury to plaintiff's building, which is set forth in each of the four counts of the declaration as follows: First count: "Which standpipe, by reason of the fact that there is a constant apprehension that it may fall over upon said hotel building, and, by its great weight, injure, crush or destroy the same, or that it might blow over upon said property, or burst and flood the same, greatly depreciates in value the premises for residence, hotel and business purposes, and especially greatly depreciates in price the market value of said premises." Second count: "Which standpipe is liable to fall or blow over upon said premises, and, by its great weight, injure, crush or destroy said building, and is liable to burst and flood said premises, and thus injure the same, or destroy the said hotel building, and thereby greatly depreciates in value said premises," etc. Third count: "Which standpipe is of a dangerous character, and is liable to fall or blow over upon said hotel building, and, by its

great weight, injure, crush or destroy the same, and is liable to burst and flood said premises, and thus injure the same, or destroy the said hotel building; and the standpipe is a constant menace to plaintiff's property, and the liability of said structure and structures of like character to fall or blow over or burst has thereby greatly depreciated in value said premises for residence, hotel or other business purposes, and especially greatly depreciates in price the market value of said premises." Fourth count: "And, by reason of defendant's constructing, or causing to be constructed, said standpipe, as above stated, in the public streets of said city, and so near to plaintiff's hotel building, said standpipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting room in the southwest corner of said hotel building, and obstructs the view from said hotel building; and said standpipe, being of so great height, and in front of and near said plaintiff's said premises, casts a shadow upon said hotel building, and makes the appearance of said premises unsightly, and otherwise injuriously affects said premises, and thus plaintiff's said premises are less convenient and comfortable for residence and hotel purposes; and by reason of the wrongful acts and doings of the defendant as aforesaid, and the injuries done to plaintiff's property as aforesaid, the market value of plaintiff's said premises is thereby greatly decreased." Each of these counts concludes with the averment "that, by means of the premises, the said defendant has greatly injured and damaged the said property of plaintiff, within the meaning of the Constitution and laws of the state of Illinois; yet the said defendant has never paid, nor offered to pay, to the said plaintiff, any of the damage so injuriously and unjustly caused to the plaintiff's said property, nor has any proceeding been instituted by the defendant for the purpose of having just compensation therefor ascertained; and the plaintiff avers that by reason of the premises above set forth the plaintiff's said property has been greatly damaged and depreciated in value, to the damage of said plaintiff of the sum of three thousand (\$3,000), and, therefore, she brings her suit," etc. It thus appears that the declaration proceeds both upon the ground that placing the standpipe in the street was wrongful, and, even if authorized by law, plaintiff's property could not, under the Constitution, be damaged thereby without

just compensation, which had not been ascertained. The demurrer was, in effect, general to each count, viz., it made no objection to the declaration on account of duplicity or the mere form of pleading, and, therefore, the only question presented for our decision is, does either of the counts state, in substance, a good cause of action?

It is insisted on behalf of the city that, being the owner of the fee in the streets, and having the absolute control over them, it had a right to build the standpipe in them, and that, if injury resulted thereby to plaintiff's property, it is *damnum absque injuria*. The soundness of this position depends upon whether the placing of a structure like that described in the declaration in the streets of a city is consistent with the objects for which streets are established, and held by municipal authorities in trust for the public use. The general rule, long recognized by this court, is that, having the fee and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established. *City of Quincy v. Bull*, 106 Ill. 337, and cases there cited. In the application of the rule it has been held in the case cited and others that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer and gas pipes under, public streets, and that property owners could neither enjoin such use, nor recover damages to property occasioned thereby. Laying pipes under the streets for the purpose of distributing water and gas, and carrying off sewage, is lawful, both because it is necessary for the health, comfort and convenience of the inhabitants, and because it in no way interferes with, and is not incompatible with, the use of such streets for public travel. Railroad tracks may be lawfully laid in streets for the same reason. As stated in the *Moses case*, 21 Ill. 522, cited in *City of Quincy v. Bull*, *supra*: "A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." It was, however, held in *Stack v. City of East St. Louis*, 85 Ill. 377, and cases cited to the same effect in *Ligare v. City of Chicago*, 139 Ill. 46; 28 N. E. Rep. 934, that, in permitting the use of streets for other purposes than public thoroughfares, "the city has no right to so obstruct them as to

deprive the public and adjacent property holders of their use as streets. The primary object is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use." It does not follow, therefore, that, because railroad tracks may be put on or pipes under streets, structures like the one described in this declaration can be built in them. Water and gas pipes, with hydrants, lamp posts and other appliances, are necessary for the distribution of water and light over the city, and the streets may be legitimately used for that purpose; but it would scarcely be contended that the water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use. In fact, directly the contrary was held in *City of Morrison v. Hinkson*, 87 Ill. 587, as to water works. It was there said: "But it is not conceded that the erection of a water tank in the center of the street, occupying one-half of the width thereof, and the erection and operating of a steam engine in connection therewith, even for the purposes of supplying the city and the residents thereof with water, are some of the uses of a street as such, for which the ground may be appropriately used under a dedication thereof as a street. The owner of a lot adjoining a street does not take the same subject to any such easement." It is true it was stated in that case that the proof did not show in whom the fee of the street was vested, but, if the same could not be said here (there being no allegation in the declaration as to that fact), still, as shown by *Stack v. City of East St. Louis*, *supra*, and cases there referred to, the fact that the title is in the city gives it no right to prevent its use as a street. The fee-simple title, though in the city, is held in trust for the public use as a street. Nor do we regard the fact that the tank in *City of Morrison v. Hinkson* occupied more of the street, and was filled by machinery immediately attached, also in the street, distinguishes that case in principle from this. A standpipe is but a part of the machinery and appliances with which water is forced into the pipes throughout the city. There is no necessity for placing it in a public street, and, so far as appears in this case, neither the health, comfort nor convenience of the public or individual citizens is promoted by so doing. Therefore, placing it there was an unlawful use of the street, and the dimensions of the structure, and the

manner of operating it, in the decision of this case, affect only the question of damages, to be hereafter considered. Our opinion, then, is that the allegations of the declaration, admitted by the demurrer, show that the city wrongfully placed the structure in its streets.

It does not, however, follow that a good cause of action in the plaintiff is shown by her declaration. It is well settled that for obstructions to streets, resulting in no special injury to an individual, the public alone can complain. *McDonald v. English*, 85 Ill. 232; *City of Morrison v. Hinkson*, supra. The individual right, under our present Constitution, is thus stated in *Rigney v. City of Chicago*, 102 Ill. 80: "While it is clear that the present Constitution intended to afford redress in a certain class of cases for which there was no remedy under the old Constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station or the like will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of a *damnum absque injuria*. So as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. When the action is by an individual, the special injury is the gist of the action, and, unless it is alleged and proved, there can be no recovery." *McDonald v.*

English, *supra*. Under this rule it is too clear for argument that neither of the first three counts of the declaration shows a right of action in the plaintiff. The special injury attempted to be set up in each of these counts is that her property has been depreciated in value because of the danger of the building being destroyed or damaged by the standpipe falling or being blown upon it, or by bursting and flooding it with water, but not a single fact is alleged upon which the apprehension of such danger can be based. In the first count nothing but the apprehension itself is alleged; and in the second and third, merely that it (the standpipe) is "liable" to fall, blow over or burst. Why the apprehension exists, or why it is liable to fall, etc., is left wholly to conjecture. It certainly will not be contended that the manner in which it is constructed, as shown by the declaration, necessarily renders it dangerous. No one will deny that such a structure could be rendered reasonably secure by proper stays and braces, though it might not be so without. True, as in the instances referred to by counsel for appellee, water towers and standpipes have fallen or been destroyed, but the same is true of every kind of buildings—perhaps of all superstructures. If this one is liable to fall, blow down or burst, that liability must arise from certain facts, and those facts must be pleaded. Here we have nothing but the mere conclusion of the pleader. The fourth count avers that "said standpipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting room in the southwest corner," etc. We are unable to see why this is not a sufficient allegation of special injury to plaintiff's property to entitle her to recover. *Rigney v. City of Chicago*, *supra*. The extent of the injury is a question of fact, to be determined upon plea and trial. We think the Circuit Court erred in sustaining the demurrer to the fourth count. Reversed and remanded.*

Miscellaneous uses of streets.—Tanks erected in a public street to supply water for street sprinkling were held to be a legitimate street use by the Supreme Court of Oregon in *Savage v. City of Salem*, 7 Am. R. R. & Corp. Rep. 428. For cases relating to miscellaneous uses of streets see 6 Am. R. R. & Corp. Rep. 348, note 23; Lewis Em. Dom. §§ 126, 132, 133.

* Reported in 37 N. E. Rep. 1096.

EELS v. AMERICAN TELEPHONE & TELEGRAPH Co.

(Court of Appeals of New York, October 9, 1894.)

1. TELEGRAPH POLES IN HIGHWAY. HIGHWAY USES GENERALLY. The primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move, and the intelligence be transmitted by some moving body, which must pass along the highway, either on, or over or perhaps under it.

2. The primary and fundamental idea of the highway is that it is a place for uninterrupted passage by men, animals or vehicles, and a place by which to afford light, air and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter may be.

3. TELEGRAPH IN HIGHWAY AN ADDITIONAL BURDEN. The erection of a line of telegraph in a rural highway, the fee of which is in the abutting owners, is not a new method of exercising the old public easement, but a permanent and exclusive use and possession of a part of the way for a totally distinct and different kind of use from that of the legitimate public easement of a highway, which cannot be made without compensation to the owner of the fee.

4. EJECTMENT AGAINST TELEGRAPH COMPANY. Where a line of telegraph poles and wires is erected in a rural highway, the fee of which is in the abutting owners, such owners may maintain ejectment to recover the land so occupied, subject to the public easement therein for a highway.

ACTION by Charles Eels against the American Telephone and Telegraph Company. From a judgment of the General Term (20 N. Y. Supp. 600), affirming a judgment for plaintiff, defendant appeals.

Sherman S. Rogers, for appellant. *John M. Hull*, for respondent.

PECKHAM, J. The sole question involved upon this appeal is the extent of the public easement in a rural highway, the fee of which is in the adjoining owner. The plaintiff herein is the owner in fee, subject to the public easement, of the premises in question, which constitute part of a public highway in the town of Alden, and county of Erie, in this state. The defendant occupies a portion of the highway with its poles, upon which it has strung its wires for the purpose of conducting its business as a telephone and telegraph company. It is incorporated and organ-

ized under the laws of this state for the incorporation and regulation of telegraph companies. The plaintiff claims that the defendant has no right to occupy any portion of the public highway with its poles, and he has, therefore, commenced this action of ejectment to recover the premises described in the complaint, subject to the public easement therein for a highway. The court upon the trial directed a verdict for the plaintiff, and, the judgment entered upon it having been affirmed by the General Term, the defendant has appealed here.

The defendant admits that if the use it makes of the highway is outside the scope of the public easement, then the consent of the owner of the soil is necessary, or compensation must be made him for such use. By the fifth section of chapter 265 of the Laws of 1848, providing for the incorporation and regulation of telegraph companies, as amended by the second section of chapter 471 of the Laws of 1853, it is provided that telegraph corporations may construct their lines upon any of the public roads, streets or highways of the state, provided the same shall not be so constructed as to incommode the public use of the roads or highways; and they are also authorized to construct the same upon any other land, subject to the right of the owner to full compensation therefor. It has been held that a telephone company is, within the provision of the statute, a telegraph company. Telephone cases, 126 U. S. 6; 8 Sup. Ct. Rep. 778; Hudson River Tel. Co. v. Watervliet, etc., Ry. Co., 135 N. Y. 393, 404; 32 N. E. Rep. 148. The defendant does not, however, contend that the statute gives any right to these companies to make use of the highway for the purpose of constructing their lines thereon without compensation to the owner of the fee of the highway, unless such use is in its nature a part of the public easement for which highways are constructed. The statute, therefore, does not aid in the decision of this question, but it is cited by the defendant as evidence of legislative belief that such use of the highway was legitimate, and within the purpose for which highways were laid out. Defendant also urges that some weight is to be attached to the alleged fact that this use of the highway has been very generally acquiesced in by the adjoining owners of the land, and that such acquiescence is quite strong evidence that the use was proper.

The question is one plainly of law, and, whatever may have hitherto been the legislative belief or the opinion of the adjoining owners as to the propriety of this use of a rural public highway, it must be decided by us in accordance with our own view as to what the law is upon the subject. The length of time which any particular adjoining owner has acquiesced in this use of a highway, the circumstances attending upon and surrounding that acquiescence, the probable considerations operating either to create or to continue it, are all alike matters upon which the court is completely ignorant, and any opinion as to the legality of the use, founded upon an acquiescence by the adjoining owners under circumstances unknown to the court, must, in its very nature, be almost, if not entirely, worthless. The argument founded upon the legislative belief of the legality of such use has also very little weight. There was no warranty implied from the passage of the statute that the consent of the state alone was necessary. All the facts were known to all the parties, and whether, in addition to the consent of the state, that of the adjoining owners was necessary, was a matter which the state might well leave to the parties interested to try out when the point arose. The question has never been covered up or otherwise concealed, and at the most it can only be urged that the legislature was of the opinion, upon this purely legal question, that the consent of the adjoining owner was not necessary. It is not contended that if it had held the other opinion it would have legislated any more favorably for the companies. If such consent were necessary it was on account of the constitutional provision that private property should not be taken for public use without due compensation, and this provision the legislature could neither alter nor efface. The companies cannot, therefore, be legally said to have suffered anything by reason of this legislative opinion, and they are not on that account in any position to appeal to a specially favorable construction of the law in their behalf. The legislature could have provided that in all future dedications of land for a public highway, and in taking land under the right of eminent domain for that use thereafter, the right to use it for the purpose for which defendant now uses the highway in question would be implied in such dedication, and paid for when taken. That would have no effect upon land already dedicated or taken for

a highway, and could not aid the defendant. An alleged practical construction of the law for many years by the general public in favor of the defendant's contention cannot be the foundation upon which, if proved, to base a legal claim on the part of the defendant; and, unless it can show that its use of the highway at the locus in quo is within the limitation of the public easement, it can create no right of continuance in such use arising from a general public acquiescence in its claim, provided the plaintiff, or those under or through whom he claims, have not given, expressly or by implication, the requisite consent. What other parties may have thought, or what action they may have taken, upon such a question, and with regard to their lands, cannot in any manner conclude or affect the plaintiff when he chooses to deny the existence of defendant's right to use land of which plaintiff owns the fee, subject to the public easement therein for a public highway. We agree with the learned counsel for the defendant that the question is not essentially different from that which would arise if the state itself, through its public officers, by virtue of an act of the legislature, should attempt to operate a telegraph line by means of poles, etc., placed in a public highway and without the consent of, or compensation made to, the adjoining owners, who owned the fee of the highway subject to the public easement. If the state itself could do such an act, it could create and authorize a corporation to do it.

We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation; but the Constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, what are the uses implied in such dedication or taking? Primarily, there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement. If this easement

do not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant herein has no defense to the plaintiff's claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance of property or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it. In the case at bar the fee in the highway at the point in controversy is in the plaintiff, but I do not regard that fact as controlling upon the question of the proper use of the highway. Of course, the plaintiff could not recover in this form of action unless he owned the fee in the highway at this particular point; but I do not think the proper use of the highway depends upon the question as to who owns the fee thereof. I think that the rights of the public in and to the highway remain the same wherever the fee thereof may be placed. 2 Dill. Mun. Corp. 698a, etc. As the fee in this case is in the plaintiff, the discussion of the question must be had with reference to that fact. Where one owns to the center of a street in a city, it has been held that the laying of the rails of a horse railroad imposed an additional burden upon the land forming the street, for which the owner was entitled to compensation. *Craig v. Railroad Co.*, 39 N. Y. 404. Although relief was denied a plaintiff who did not own the fee, and who desired to enjoin the use of the street by a horse railroad company, it was denied upon the ground that there was no taking of the property of the plaintiff by the company, and that being authorized by the legislature the plaintiff could not complain. *Kellinger v. Railroad Co.*, 50 N. Y. 206. The plaintiff sought in that action to recover damages for inconvenience of access to his adjoining lands. In the *Craig*

case, *supra*, the case was decided upon the idea that there was an exclusive occupation of the street, which amounted to an additional burden upon the land. The cases upon the subject of railroads in streets are cited and commented upon in *Fobes v. Railroad Co.*, 121 N. Y. 505; 24 N. E. Rep. 919; *Kane v. Railroad Co.*, 125 N. Y. 164; 26 N. E. Rep. 278, and *Reining v. Railroad Co.*, 128 N. Y. 157; 28 N. E. Rep. 640; and they show that the primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals or vehicles, and a place by which to afford light, air and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently, and, to some extent, exclusively, appropriated by the elevated railroads, that it was held their erection, without the consent of the abutting owners, was illegal. *Story v. Railroad Co.*, 90 N. Y. 122.

We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly-discovered method of exercising the old public easement, for the very reason that this so-called "new method" is a permanent, continuous and exclusive use and possession of some part of the public highway itself, and, therefore, cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method or means of locomotion. All these might be varied, increased as to number, capacity or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same—a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. The following are some of

the many authorities which hold that the easement is one of passage only: *Goodtitle v. Alker*, 1 Burrows, 133; *Trustees of Presbyterian Soc. v. Auburn & R. R. Co.*, 3 Hill, 567, and cases cited; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 55; 27 N. E. Rep. 973. Defendant argues that the case in 3 Hill, *supra*, while announcing the principle above stated, yet did not in fact involve the question, and is not authority to be regarded, while the cases cited in the opinion in that case, the defendant claims, do not really support the principle. We think the case in Hill correctly states the law upon the subject, and that case has been very frequently cited with approval by this court to sustain the above proposition, and among the cases where such citations are to be found is that of *Gaslight Co. v. Calkins*, 62 N. Y. 386. That case is, as we think, substantially decisive of this one. It was there decided that plaintiff had no right to lay its gas pipes in a country highway without the consent of, or compensation to, the owner of the fee. It was also reiterated that the right of the public was a mere right of passage, and the fee of the land remained in the owner for all other purposes. As to whether there is a different or more comprehensive right in regard to streets in cities, the case does not decide, although it is intimated the right may be greater there than in a purely country highway. While concurring in the view that the easement in a public street in a city or village may well be greater as the actual necessities of the case are greater for sewers and gas and water pipes, yet in this case, as we have to deal only with the easement in a purely country highway, it is not important to discuss how the easement became greater in the one case than in the other, or as to the time when the right to the enlarged use of the highway or street attaches, or the method or means by which the right to such enlarged use was attained. Density of population creates public necessities for water, light, drainage and other conveniences which do not exist in purely rural districts, and along a purely rural highway. Yet the same land might alter from a country highway to a city street, and it might be determined that there was an implied dedication of the country highway at the time the land was taken to the uses which the future village or city street might require. We do not decide as to that matter, nor do we intimate that the defendant would or would not have the right to

place its poles in the city street without compensation to the owner, if he owned to the center of the street.

The argument is pressed upon us that the question to be decided in this case is new, and that it ought to be decided with reference to the wants and customs of the advancing civilization, which it is alleged is doing so much to render life more comfortable, attractive and beautiful. Courts are frequently addressed with such arguments, which are quite forcible, and have in this case been very eloquently, plausibly, and aptly advanced. The answer to be made is that, although this particular phase of the question, strictly speaking, may itself be new, yet the principle which governs our decision is as old almost as the common law itself; and in deciding this appeal favorably to the defendant herein we should be overturning and making nothing of cases which have been regarded as the law for generations past. A majority of the states whose courts have considered the question have decided it in accordance with our own views. The cases are collected in the brief of the learned counsel for the respondent herein. Let the defendant pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the refusal of an owner will not stop the proposed undertaking. The amount of the compensation is not now the question, but that in many cases it can be any thing more than merely nominal would seem to be a proposition which would not require great elaboration of argument to make plain. The use would frequently be but a technical encroachment upon the rights of the adjoining owner, and there would be but little fear that anything more than nominal damages would be allowed. This cannot, however, alter the legal rights of the parties, and in regard to them we think the courts below have decided correctly, and the judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.*

Telegraph and telephone poles and wires in street — rights of abutting owners.—The authorities upon this question are collected and reviewed in 6 Am. R. R. & Corp. Rep. 340, note. *People v. Eaton*, (Mich.) 59 N. W. Rep. 145, is a recent case involving the same question as the principal

* Reported in 38 N. E. Rep. 202.

case. The statutes of Michigan authorized the construction of telegraph lines upon the public highways, provided they were so constructed as not to incommode the public in the use thereof, but made no provision for compensation to the owner of the fee. Eaton was convicted of an assault upon an employee of a telegraph company, who was at the time engaged in erecting a line of poles in the highway in front of his farm, under authority of the statutes referred to. Eaton ordered the employees of the company to desist from erecting the poles, and, in endeavoring to enforce his command, committed the assault in question. As the cases upon this question are few, we give so much of the opinion as discusses the right of the abutting owner to compensation. After referring to the statutes the court says :

“ The principal question in this case is whether these acts conflict with article 15, section 9 of the Constitution, which provides: ‘The property of no person shall be taken by any corporation for public use without compensation being first made or secured in such manner as may be prescribed by law.’ Is the placing of telegraph poles along a public highway an additional servitude upon the land of the adjacent proprietor? Public highways are under legislative control. They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon the use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods. Cooley Const. Lim. 588. It has been settled in this state that lands to be taken or granted for public highways are so taken or granted for all the purposes for which they may be used for the benefit of the public, for the passing or repassing of travelers thereon, for the transportation of passengers by stage coach, omnibus or street cars propelled by horses, steam or electricity, and that the laying of tracks for such street cars is not an additional servitude upon lands of adjacent proprietors. In *Railway v. Mills*, 85 Mich. 634; 48 N. W. Rep. 1007, the defendant threatened to cut down and destroy the poles erected for stringing wire for the use of an electric street railway, and the claim was made by the defendant that he had the right to remove such poles because they were an additional servitude. It was held that he had no right; that the erection of poles for such a road was in the furtherance of public travel; and that, to constitute an additional servitude, there must be an injury to the present use and enjoyment of the land. See, also, *People v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522; 52 N. W. Rep. 1010; *Dean v. Railway Co.*, 93 Mich. 330; 53 N. W. Rep. 396. It is difficult to see any distinction between the use of the highway for electric railway poles and poles erected for the use of telegraph or telephone companies. In commenting upon this claimed distinction, Judge DILLON, in his work on *Municipal Corporations* (4th ed. p. 893, note), says: ‘The distinction is so fine as to be almost impalpable.’ These telegraph construction acts have been in force in this state for many years, and this is the first time in the history of the state, so far as I have discovered, where it has been claimed that the placing of such poles in the highway is an additional servitude. We are aware that in some states the doctrine is laid down that the placing of such poles creates additional servitude upon the fee, but there are many cases holding the other way. *Pierce v. Drew*, 136 Mass. 79, and *Julia Bldg.*

Assn. v. Bell Tel. Co., 88 Mo. 258, hold that additional servitude is not created; and, we think, upon better reasoning. These cases accord with the views of this court in *Railway v. Mills*, supra, and other cases in this state relative to the use of the street for street railway purposes. If damage follows from the erection of such poles, the acts provide a method of settling that question. * * * When these lands were taken or granted for public highways, they were not taken or granted for such use only as might then be expected to be made of them, by the common methods of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country, or the discoveries of future times, might demand. The parties setting these poles were acting under color of legal right. The statute under which they acted is not in conflict with the provisions of the Constitution above cited. It would be a great calamity to the state if, in the development of the means of rapid travel, and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid or a pole set. The legislature certainly has never so regarded this provision of the Constitution, and never till now, when more than forty years have elapsed since the passage of these acts, has any one supposed that such a construction was to be placed upon the provisions of the Constitution. The conviction must be affirmed." McGRATH, Ch. J., dissented.

GAMEWELL FIRE ALARM TEL. CO. v. CRANE et al.

(Supreme Judicial Court of Massachusetts, October 27, 1893.)

CONTRACTS IN RESTRAINT OF TRADE. AGREEMENT NOT TO ENGAGE IN BUSINESS. A stipulation by a manufacturer of fire alarm and telegraph apparatus, on a sale of all his machinery, stock, letters patent and inventions, that he will not for ten years engage in the manufacture and sale of such apparatus, or enter into competition with the purchaser, either directly or indirectly, while valid in so far as the patents and inventions agreed to be sold are concerned, is void, as against public policy, in so far as it prohibits the seller from engaging in the manufacture and sale of such apparatus under other patents, or under no patents at all, since the prohibition is not restricted as to place, and not necessary to the purchaser's enjoyment of the patents and inventions which he had purchased.

BILL by the Gamewell Fire Alarm Telegraph Company against Moses G. Crane and Frederick W. Cole to enjoin defendant Crane from engaging in the manufacture and sale of fire alarm and police telegraph apparatus in violation of his contract with plaintiff, and to enjoin defendant Cole from participating with Crane in the violation of said contract. Final decree was

entered in plaintiff's favor as against defendant Crane, but the bill was dismissed as against Cole. Plaintiff and defendant Crane both appeal.

M. Storey and S. L. Powers, for plaintiff. *S. J. Elder and Brackett & Roberts*, for defendant.

FIELD, Ch. J. The plaintiff company and the defendant Crane have each appealed from the decree of the Superior Court. The principal question is whether the following stipulation in the contract between the plaintiff and Crane is void. The stipulation is: "Said Crane further agrees not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years next ensuing after the date of this agreement." Crane had been a manufacturer of fire alarm and police telegraph apparatus from the year 1856 to 1886, when the contract was entered into which is the subject of this suit. From the year 1879 to January, 1891, he was a director of the plaintiff company. In 1881 he, or the firm of which he was a member, entered into a contract with the plaintiff company to do all of its manufacturing. He testified that the company "was to have the use of patents of mine for the term of ten years, and to give all its manufacturing to Moses C. Crane or Crane & Co., and they agreed not to compete with the Gamewell Company during that time." This is the contract which was annulled by the contract in suit. By the contract in suit Crane sold and conveyed to the company all his machinery, tools, draw cases and other property used in or connected with his business of manufacturing for said company, including "stock supplies partly manufactured, and raw material of every kind in any way pertaining" to said business of manufacturing in his factory at Newton Highlands, in Massachusetts, and he agreed to transfer to said company exclusive rights under and control of all letters patent for fire alarm and police apparatus only, owned or controlled wholly or in part by him, together with exclusive rights under and control of all improvements in said fire alarm and police apparatus only, made by him up to the date of the contract, and he gave to said company the "first

option to purchase or obtain exclusive control for fire alarm and police purposes only, under any and all letters patent, improvements applicable to such apparatus which may be made by said Crane during the term of ten years next ensuing after the date of this agreement," etc. The consideration to be paid was \$30,000 in cash and notes, and such unwrought stock, machinery, etc., as was on hand at the date of the transfer, and was not included in the schedule attached to the contract, was also to be paid for at the "cost price, to be fixed by appraisal." Crane also agreed to let his factory to the company at a reasonable rent if the company desired to hire it. The company actually paid Crane about \$47,000 as the consideration of the contract and the property conveyed.

The plaintiff contends that the agreement "not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years," etc., is not void as being in restraint of trade — First, because it is an agreement pertaining to "property and business protected by patents;" secondly, because the restraint is coextensive only with the business sold, and is necessary to enable the company to enjoy fully what it has bought and paid for; and, thirdly, because it relates to a single commodity, not of prime necessity, and not a staple of commerce. See *Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. Rep. 629; *Machine Co. v. Morse*, 103 Mass. 73; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92; 27 N. E. Rep. 1005. There seems to be no reason why the defendant Crane should not assign the patents and inventions which he agreed to assign, if there are any, and no serious objection has been raised by the defendant on this part of the case. The defendant contends that he has a right to assist in forming a corporation, and to act as one of its officers, the business of which is to manufacture and sell fire alarm and police telegraph machines which are not made under any patents owned by the plaintiff, or under any patents which he has agreed to assign to the plaintiff, or which the plaintiff has elected to purchase, under the option given in the contract, even although by so doing he enters into competition with the plaintiff in its business. He, in effect, concedes that,

so far as the business is protected by patents which he has assigned or agreed to assign, the restraint is valid. It appears that there are "a dozen or fifteen concerns in the United States engaged in a somewhat similar business." The defendant testified that he looked up the number of patents pertaining to this branch of the art in 1881, and that there were then about 500. The defendant contends that he ought to be able to use his own patents for subsequent improvements applicable to such apparatus, if the plaintiff does not elect to purchase them; that he was previously a manufacturer of fire alarm and police telegraph apparatus, and not a seller thereof; that the good will which attached to his business was that of a manufacturer who did not sell his manufactures in the market, and that it is against public policy that he should be restrained from exercising his peculiar skill anywhere in the United States or in the world for the period of ten years. The apparatus, as the defendant contends, which he has a right to manufacture and sell, is not secret machinery, and is not protected by any patents which the plaintiff owns or has a right to control, but is apparatus either not protected by patents at all, or by patents of his own, or of some other persons who may choose to employ the defendant. The only ground, then, on which this restriction can be maintained is that it is reasonably necessary for the beneficial enjoyment by the plaintiff of the property it bought of the defendant, or, if this is not so, that the law in modern times does not regard such an agreement as against public policy. So far as we are aware, in every modern case in this commonwealth, except one where a contract in restraint of trade has been held valid, the restriction has been limited as to space. In *Taylor v. Blanchard*, 13 Allen, 370, the parties entered into a partnership for carrying on "the trade or business of manufacturing shoe cutters," and it was provided that "at whatever time the said copartnership shall be determined and ended," the defendant "shall not, nor will, at any time or times hereafter, either alone or jointly with, or as agent for, any person or persons whomsoever, set up, exercise or carry on the said trade or business of manufacturing and selling shoe cutters at any place within the aforesaid commonwealth of Massachusetts, and shall not nor will set up, make or encourage any opposition to the said trade or business hereafter to be carried

on" by the plaintiff. The manufacture of shoe cutters was an art which could be carried on only by persons instructed in it, and the business was confined to the plaintiff and three other persons; but the court held the agreement void. In *Bishop v. Palmer*, 146 Mass. 469; 16 N. E. Rep. 299, the plaintiff, being engaged in the manufacturing and selling of bedquilts and comfortables, conveyed to the defendant his "entire business plant and enterprise as a manufacturer of and dealer in bedquilts and comfortables," together with the good will of the business, and all the machinery, implements and utensils used by him in said business, and agreed "that for and during the period of five years from the date hereof he will not, either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part." It was held that this was clearly illegal and void as being in restraint of trade, because not limited as to space. See, also, *Alger v. Thacher*, 19 Pick. 51; *Pierce v. Fuller*, 8 Mass. 223, 226; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 43; *Palmer v. Stebbins*, 3 Pick. 188; *Gilman v. Dwight*, 13 Gray, 356; *Angier v. Webber*, 14 Allen, 211; *Dean v. Emerson*, 102 Mass. 480; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149; 22 N. E. Rep. 634. The case of *Machine Co. v. Morse*, *ubi supra*, is the case referred to as an exception. The question arose upon demurrer. The agreement of the defendant was not only to transfer his patents, machinery, etc., and all improvements and inventions, but "that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company," and that he "will do no act that may injure the company or its business, and that he will at no time aid, assist or encourage in any manner any competition against the same." He also agreed "to serve as the superintendent of the company for three years," etc. The plaintiff company was formed by the defendant and others, and the defendant's business was transferred to it. He was a stockholder, and was made superintendent.

The plaintiff agreed to employ the defendant for three years, and he was actually employed as superintendent up to the time he entered upon a competing business. The case seems to have been decided on the ground that the defendant had agreed to give to the plaintiff his exclusive services with reference to his mechanical skill and ingenuity in all improvements, alterations and combinations which would tend to insure the success of the plaintiff in manufacturing twist drills and collets. The court say that "the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." The opinion proceeds to consider the English cases where the restriction was held not to extend beyond the good will of the business which was the subject of the sale, or was not greater than the interests of the vendee required, and was not unreasonable in view of all the circumstances. This doctrine, in England, has been carried very far. See *Davies v. Davies*, 36 Ch. Div. 359. In this country the courts generally have not gone so far, but the old law has been a good deal modified in some jurisdictions in view of modern methods of doing business. See *Navigation Co. v. Winsor*, 20 Wall. 94; *Fowle v. Park*, 131 U. S. 88; 9 Sup. Ct. Rep. 658; *Ellerman v. Stockyards Co.*, 49 N. J. Eq. 217; 23 Atl. Rep. 287; *Association v. Starkey*, 84 Mich. 76; 47 N. W. Rep. 604; *Matthews v. Associated Press*, 136 N. Y. 333; 32 N. E. Rep. 981; *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Match Co. v. Roeber*, 106 N. Y. 473; 13 N. E. Rep. 419; *Whitney v. Slayton*, 40 Maine, 224. In the present case the plaintiff did not buy the good will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus. The plaintiff gets everything it bought if it gets the tangible property and the letters patent and the improvements which the defendant Crane agreed to convey. The stipulation that Crane will not for ten years manufacture or sell fire alarm or police telegraph machines and apparatus, although under patents, in which case it has refused to buy, or under no patent at all, will tend to give the plaintiff a monopoly of the business. To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living. The stipulation

seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion. The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market. Large cities and towns cannot well do without some kind of fire alarm and police telegraph apparatus, and it is an article of necessity for such municipalities. We are of the opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times declared by this court, we think it is for the legislature to make it. See *Factor Co. v. Adler*, (Cal.) 27 Pac. Rep. 36; *Taylor v. Sourman*, 110 Penn. St. 3; 1 Atl. Rep. 40; *Richardson v. Buhl*, 77 Mich. 632; 43 N. W. Rep. 1102; *Herreshoff v. Boutineau*, (R. I.) 19 Atl. Rep. 712; *Strait v. Harrow Co.*, (Sup.) 18 N. Y. Supp. 224; *Anderson v. Jett*, (Ky.) 12 S. W. Rep. 670; *Urms-ton v. Whitelegg*, 63 Law T. R. (N. S.) 455; *Perls v. Saalfeld*, (1892) 2 Ch. 149. For these reasons a majority of the court are of opinion that the decree against Crane should be substantially affirmed as to the assignment of patents and inventions and as to costs, and should be reversed as to the rest. The decree in favor of Cole should be affirmed. So ordered.*

PUBLIC POLICY AS A BASIS FOR JUDICIAL DECISIONS.

1. **What is public policy — definitions.**— It has been said that "public policy does not admit of definition and is not easily explained." *KEKEWICH, J.*, in *Davies v. Davies*, 36 Ch. Div. 359, 364. At the same time if the mind could not form some general conception of what is meant by "public policy," it would be impossible to apply the principle to particular cases. *Greenhood's* definition or statement of the principle is as follows: "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." *Greenhood Pub. Pol.* 2. This is substantially the language of Lord *TRURO* in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, 196. The Illinois Supreme Court says: "Public policy is that principle of law which holds that no subject or citizen can lawfully do

* Reported in 160 Mass. 50; 35 N. E. Rep. 98.

that which has a tendency to be injurious to the public, or against the public good." *People ex rel. Peabody v. Chicago Gas Trust*, 1 Am. R. R. & Corp. Rep. 562, 575. And again: "Whatever is injurious to the interests of the public is void on the ground of public policy." *Craft v. McConnoughy*, 79 Ill. 346.

A writer upon the subject of "Public Policy in the Law of Contracts," in 29 Cent. Law Jour. 309, gives the following definition: "It is synonymous, therefore, with the public welfare, and the public welfare requires that the public health, justice, morals, trade and peace be kept inviolate. Whatever is injurious to these great interests, which society cherishes and laws are formed to promote, is contrary to public policy and void." The definition to be found in 19 Am. & Eng. Ency. of Law, 565, is similar to that given by Greenhood and quoted above.

2. Public policy is variable.—"One thing I take to be clear," says Mr. Justice KEKEWICH, "and it is this—that public policy is a variable quantity; that it must vary and does vary with the habits, capacities and opportunities of the public; that it cannot have been the same when Chief Justice TINDALL decided *Horner v. Graves*, 7 Bing. 735, in 1831, as it was when Chief Justice PARKER decided *Michell v. Reynolds*, 1 P. Wms. 181, in 1711; that it must have changed, and did change, between 1831 and 1869, when Vice-Chancellor JAMES decided *Leather Cloth Company v. Lorsant*, L. R., 9 Eq. 35; and if there had not been a further change before Lord Justice FRY decided *Rousillon v. Rousillon*, 14 Ch. Div. 351, in 1880, it must have occurred since." *Davis v. Davis*, 36 Ch. Div. 359 (1887).

"The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion." *Evanturel v. Evanturel*, L. R., 6 P. C. 1, 29. Approved by BOWEN, L. J., in *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 3 Ch. 665.

"Public policy is variable—the very reverse of that which is the policy of the public at one time may become public policy at another." *Griswold v. Illinois Central R. Co.*, 9 Am. R. R. & Corp. Rep. 697. "Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean." *United States v. Trans-Missouri Freight Assn.*, 8 Am. R. R. & Corp. Rep. 523, 537, 538. Public policy differs in different states and countries, as well as in the same country, at different times. As people differ in their beliefs, opinions, aims, habits and surroundings, it is natural and inevitable that they should entertain different views as to what will best promote the public welfare.

From the fact that public policy is variable, it follows that no fixed rules can be laid down as to what acts and contracts are, and what are not, contrary to public policy. Decided cases must be regarded as illustrations of what is public policy at the time, rather than as establishing rules that this or that thing is contrary to public policy, which rules shall control future cases belonging to the same class. So with respect to cases holding that certain acts or contracts are not contrary to public policy. The question must ever remain open, whether public policy has changed so as to make that valid which was once held invalid, or that invalid which was once held valid. So where cases based upon considerations of public policy are spoken of as establishing a rule, the expression must be understood as one adopted for convenience and as subject to the above qualification.

“A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to be the rule of policy, a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time.” Lord WATSON in *Nordenfeldt v. Maxim-Nordenfeldt Guns & Ammunition Co.*, (1894) App. Cas. 535, 553, 554.

3. How the public policy of a state is to be ascertained.—In *License Tax Cases*, 5 Wall. 462, 469, Chief Justice CHASE, speaking for the Supreme Court of the United States, says: “This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here. There are cases, it is true, in which arguments drawn from public policy must have large influence; but these are cases in which the course of legislation and administration do not leave any doubt upon the question what the public policy is, and in which what would otherwise be obscure or of doubtful interpretation, may be cleared and resolved by reference to what is already received and established.” Again, the same court, in a suit to set aside the will of Stephen Girard, or of so much of it as provided for the foundation and support of a college, on the ground that the provisions of the will in this respect were against the public policy of Pennsylvania, said: “Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its Constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions

which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the State Constitutions and law and decisions necessarily bring before us." *Vidal v. Girard's Executors*, 2 How. 127, 198.

And in reference to the same subject, the court, in *United States v. Trans-Missouri Freight Assn.*, 8 Am. R. R. & Corp. Rep. 523, 538. says: "In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its Constitution, laws and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries."

"To discover the public policy of a state we are limited, as it was observed by Mr. Justice STORY in the *Girard Will* case, 2 How. 127, to what 'its Constitution and laws and judicial decisions make known to us.'" *Lancaster v. Amsterdam Improvement Co.*, 9 Am. R. R. & Corp. Rep. 155, 164.

According to these authorities the public policy of a state must be ascertained from two sources, its written laws and its judicial decisions. It would follow that, if these are silent as respects any given act or contract, the state has no public policy on the subject, and the act or contract must be upheld. But it is submitted that this is too narrow a view of the subject, and that courts may, and should, in the absence of written laws clearly evincing the policy of the state, determine that policy, upon general considerations of what is best for the public welfare. This matter received very elaborate and exhaustive consideration in the celebrated case of *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1 (1853). The question arose as follows: The Earl of Bridgewater devised large estates to trustees to make settlement according to certain limitations in his will, one of which limitations was to Lord Alford for life, with remainder to the heirs male of his body, but subject to a proviso "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void."

There was a similar provision in case Lord Alford should succeed to be Earl Brownlow, and should not within five years thereafter acquire one of said titles. Lord Alford died in the possession and enjoyment of the estates in question, the income of which amounted to more than £60,000 per annum. He did not succeed to be Earl Brownlow, and he did not acquire either of the titles specified. There was no dukedom or marquise of Bridgewater either in existence or abeyance at the date of the will or afterwards. Appellant was the eldest son and heir male of Lord Alford, and the question in the case was whether the above proviso should have effect according to its terms, or whether

appellant succeeded to the estates notwithstanding the proviso. The principal question discussed was whether the proviso was void as against public policy. Fourteen opinions in all are reported, including that of the lord chancellor in giving the decision from which the appeal was prosecuted. None of the lords or judges referred to any statutes having any bearing upon the matter, and all but two argued the question as one to be determined upon general considerations of the public welfare. The two exceptions were Barons PLATT and PARKE. The former says: "But it is said these provisos are illegal, and they may lead to public evil or inconvenience; that, in short, they are contrary to what is called public policy. I think this is a very grave and important question; if by public policy is meant the object and policy of a particular law, then I readily accept it as a rule, for it is a very reasonable mode of construing a particular law to look at the object with which it was framed, and the evil it was apparently intended to remove. Again, if a proviso be either illegal or impossible, no doubt it is void. But here it seems to be contended that an act, possible and legal, but in the opinion of sensible men not expedient to be done, is for that reason to be void and contrary to public policy. Now I think that this, which if really what is here meant, would altogether destroy the sound and true distinction between judicial and legislative functions, and I pray your lordships to pause before you establish such a precedent as that. By this public policy will be meant the prevailing opinion, from time to time, of wise men (and, in saying of 'wise men,' I give a favorable view of the principle) as to what is for the public good—an excellent principle, no doubt, for legislators to adopt, but a most dangerous one for judges. It is notorious that this would introduce an ever-shifting principle of decision, and that no case hereafter could be ever determined upon precedents if it was to be adopted. * * * My duty is, as a judge, to be governed by fixed rules and settled precedents." Pp. 106, 107. And Baron PARKE says: "The main ground on which it is argued that the provisos are illegal is that they are against 'public policy.' This is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and it does, in its ordinary sense, mean political expedience, or that which is best for the common good of the community; and, in that sense, there may be every variety of opinion, according to education, habits, talents and dispositions of each person who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only—the written from the statutes; the unwritten, or common law, from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of mar-

riage or trade. They have become a part of the recognized law, and we are, therefore, bound by them; but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise." Pp. 122, 123.

Somewhat similar, but less positive, views were expressed nearly thirty years before in the case of *Richardson v. Mellish*, 2 Bing. 229 (1824). In that case BEST, Ch. J., said: "I am not much disposed to yield to arguments of public policy. I think the courts of Westminster Hall (speaking with deference as a humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of public policy; they have taken on themselves sometimes to decide doubtful questions of policy, and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I, therefore, say, it is not a doubtful matter of policy that will decide this or that will prevent the party from recovering — if once you bring it to that, the plaintiff is entitled to recover; and let the doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit that, if it be clearly put upon the contravention of public policy, the plaintiff cannot succeed; but it must be unquestionable — there must be no doubt." Pp. 242, 243. In the same case Mr. Justice BURROUGHS adds: "I, for one, protest, as my lord has done, against arguing too strongly upon public policy — it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." P. 252.

And later, in the case of *Hilton v. Eckersley*, 6 E. & B. 47, 64; 88 E. C. L. R. 62, 63 (1855), Lord CAMPBELL said, on public policy as a basis of judicial decisions: "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other questions connected with the adjudication of such cases. And I cannot help thinking that, where there is no illegality in bonds and other instruments at common law, it would have been better that our courts of justice had been required to give effect to them unless where they are avoided by act of parliament. By following a different course, the boundary between judge-made law and statute-made law is very difficult to be discovered. But there certainly is a large class of decisions, which will be found collected in the report of the recent *Bridgewater* case in the House of Lords, 4 H. L. Cas. 1, to the effect that, if a contract or will is, in the opinion of the judges before whom it comes in suit, clearly contrary to public policy, so that by giving effect to it the interests of the public would be prejudiced, it is to be adjudged void." P. 64. But after expressing this doubt the learned judge proceeds to say of the bond in suit: "I have no hesitation in concluding that the association which it establishes ought not to be permitted, and the enforcing the

bond will produce public mischief. I, therefore, feel compelled, as a judge, to say that it is void." CROMPTON, J., concurred in this judgment, and their decision was affirmed in the Exchequer Chamber, thus adding one more to the "large class of decisions" in which general principles of public policy were made the basis of decision.

These remarks of various judges, especially those in *Richardson v. Mellish*, have been often quoted by those who wished to discredit the doctrine of public policy in general or prevent its application in the particular case. In so far as they inculcate caution in the application of the doctrine they are to be approved, but in so far as they argue against the doctrine altogether, or against the right and duty of judges to consider questions of public policy at large, and, in the absence of controlling laws or precedents, they are answered by innumerable cases in which the contrary views have been approved and applied.

Returning to the *Bridgewater Will* case, we call attention to some of the opinions in opposition to those already quoted. Lord Chief Baron POLLOCK says: "It is perfectly clear and certain (as a principle of law) that if this condition be against the public good it is void. This is distinctly laid down in Sheppard's Touchstone, chapter 6, where, among other conditions which are contrary to law or against the liberty of the law, a condition is also pronounced to be void which is 'against the public good,' and the learned writer must have meant something other than and different 'from contrary to law.' So Lord COKE (Co. Litt. 206b), in treating of conditions which are void as 'against law' (though they concern not anything that is *malum in se*), mentions those that are against some maxim or rule of law, and those that are 'repugnant to the state,' which I take to be, in effect, the same as the expression in Sheppard's Touchstone of 'against the public good.' Here, also, it is clear the writer meant something different from and not included in the expression 'against some maxim or rule of law. * * * This doctrine of the public good or the public safety, or what is sometimes called 'public policy,' being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and on that alone; and the name and authority of nearly all the great lawyers (whose decisions and opinions have been extensively reported) will be found associated with this doctrine in some shape or other. * * * Now, the principle that certain contracts are illegal, and, therefore, void, because they are against the public policy or the public good, is familiar to every lawyer. Why are seamen not allowed to insure their wages (which is their part of the adventure) as well as the owner his ship, or the merchant his goods? Because it is for the public good that they should have no motive to relax in their exertions to preserve the ship and cargo. Why are trustees not allowed to enter into contracts with their cestui que trust? Why was it held by Lord ELLENBOROUGH unlawful for the putative father of an illegitimate child to compound with the parish and to pay or secure a gross sum to the parish, they taking the chance of the expense being more or less? Because it was against public policy." And after referring to numerous cases he concludes, on this branch of the subject, as

follows: "My lords, after all these authorities, am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office — I should shrink from the discharge of my duty? I think I am not permitted merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example. I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise." Pp. 140, 144, 145, 147, 149.

Lord TRURO, in the same case, observes: "The principle embodied in the maxim, *sic utere tuo ut alienum non laedas*, applies to the public in at least as full force as to individuals. There are other maxims equally expressive of the principle, *nihil quod est inconveniens est licitum*, and *salus reipublicae suprema lex*. The principle I conceive to be universal, as governing as well transfers by deed as the validity of contracts and dispositions by will; I know of no text book or case impugning this principle; confusion occasionally arises from considering cases as establishing a principle, when they are, in truth, but instances of its application. * * * Some criticism has been made in relation to the language in which the principle has been expressed; exceptions have been made to the expression 'public policy,' and it has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law. * * * It has been said that this rule is too uncertain and vague to be capable of practical application by the judges, on account of the various opinions which may be entertained on the subject of public policy; but I think that that remark has no just foundation. There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good; there, no doubt, may be occasional difficulty in deciding whether a particular case is liable to the application of the principle; but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every state governed by law. Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation. It is true, as I have before said, that remarks have been made upon particular cases as calculated to impugn the principle, when the point of doubt has really been whether the circumstances of the particular case brought it within the principle." Pp. 195, 196, 197.

We have quoted at length from these opinions because they express better than we can do the reasons in support of the principle of public policy as a

basis of judicial decisions in the broad and general sense that courts will not sanction that which has a tendency to injure the public. The lords unanimously decided that the condition in question was against public policy upon this broad ground, and thereby affirmed the principle so often acted upon before.

It has never been questioned but that the legislature is the final arbiter in matters of public policy, and that in so far as it has indicated a policy in respect of any matter, the courts are concluded. The written laws of a state are, therefore, the first and most important source from which to ascertain its public policy. If these are silent in regard to the particular matter, the next most important source of information is to be found in its judicial decisions. But judicial decisions in matters of public policy as to which the Constitution and statutes are silent, must have had their origin in general considerations as to the public good. Every line of judicial precedents in this matter must have had a beginning, and in that beginning the court must have considered the matter at large, without statute or precedent to guide, and, in holding any particular act or contract to be against public policy, must necessarily have done so upon the broad ground that it had a tendency to be injurious to the public welfare. Underlying any such and every such decision were the general principles that considerations of the public welfare may be made the basis of judicial decisions, and that the courts will not sanction or enforce any act or contract which has a tendency to be injurious to the public. These principles are established by numerous precedents and lines of decisions in regard to public policy which are not founded upon any written law. Some of these have been referred to in the quotations made from the opinions in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, and many more can be found by reference to *Greenhood on Public Policy*. Many such cases are referred to by Mr. Justice SWAYNE in *Trist v. Child*, 21 Wall. 441, 449, in which an agreement to pay for lobbying services before congress was held void. In speaking of contracts against public policy, he says: "Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff, *Swayze v. Hull*, 3 Halst. 54; to pay for resigning a public position to make room for another, *Eddy v. Capron*, 4 R. I. 395; *Parsons v. Thompson*, H. Bl. 322; to pay for not bidding at a sheriff's sale of real property, *Jones v. Caswell*, 3 Johns. Cas. 29; to pay for not bidding for articles to be sold by the government at auction, *Doolin v. Ward*, 6 Johns. 194; to pay for not bidding for a contract to carry the mail on a specified route, *Galick v. Bailey*, 5 Halst. 87; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, *Gray v. Hook*, 4 Comst. 449; to pay for procuring a contract from the government, *Tool Company v. Norris*, 2 Wall. 45; to pay for procuring signatures to a petition to the governor for a pardon, *Hatzfield v. Galden*, 7 Watts, 152; to sell land to a particular person when the surrogate's order to sell should have been obtained, *Overseers of Bridgewater v. Overseers of Brookfield*, 3 Cow. 299; to pay for suppressing evidence and compounding a felony, *Collins v. Blantern*, 2 Wilson, 347; to convey and assign a part of what should come from an ancestor by descent, devise or distribution, *Boynton v. Hubbard*, 7 Mass. 112; to pay for promoting a marriage, *Scribblehill v. Brett*, 4 Brown's Par. Cas. 144; *Arundel v.*

Trevillians, 1 Chan. Rep. 47; to influence the disposition of property by will in a particular way. Debenham v. Ox, 1 Vesey, 276." In nearly all these cases the contracts in question were held void as against public policy, upon general considerations of the public welfare and not through the influence of any written law. To the list enumerated by Justice SWAYNE may be added the following, which come within the same category: Contracts in consideration of future illicit cohabitation, even though the cohabitation would not be a crime, or in aid of prostitution, Trowinger v. McBurney, 5 Cow. 253; Greenhood Pub. Pol. 201; contracts tending to obstruct or interfere with the course of public justice, Dawkins v. Gill, 10 Ala. 206; Greenhood Pub. Pol. 441; Bishop on Contracts, § 475; contracts, the object or necessary tendency of which is to place one owing duties to third persons in a position where he is under obligations to two parties having antagonistic interests," Greenhood Pub. Pol. 292; Holcomb v. Weaver, 136 Mass. 265; Woodruff v. Wentworth, 133 Mass. 309; contracts to insure seamen's wages, Webster v. De Tastet, 7 T. R. 157; Lady Durham, 3 Hagg. 196, 201; Icard v. Gould, 11 Johns. 279; wager contracts, 1 May Ins. §§ 74-75b; King v. State Mut. Fire Ins. Co., 7 Cush. 1.

It seems to us, therefore, that in considering what is the public policy of a state, the courts are not limited exclusively to its written laws and judicial decisions, but that, in the absence of written laws, indicating a policy in the particular matter, they may, and are bound to, determine the matter upon broad grounds of the public welfare. If a case arises for which no precedent exists, the court must be governed by its own opinion as to the tendency of the matter in question to prejudice the public welfare. If a case arises for which a precedent does exist, the question still remains whether public policy is the same as when the precedent was made, and in determining this question the court is necessarily at large. It is an accepted principle of the common law that, in applying judicial precedents, we must look, not only to the decision but to the reason upon which it is founded. If the reason ceases to operate, the precedent loses its binding force. Now, one of the strongest proofs that courts may consider questions of public policy upon the broad and general grounds already indicated, is that judicial decisions are made and changed as judicial views of public policy exist and change, without the intervention of any statute. If judicial decisions *made* public policy then a policy once established by a judicial precedent would continue until changed by statute. But such is not the case. Judicial decisions do not *make* public policy, but simply illustrate what it is, or is deemed to be, at the time they are made. A reference to the course of decision in regard to contracts in restraint of trade will be sufficient upon this point, and this is shown at length in the note to the succeeding case. For the purpose of this note, it will be sufficient to quote the language of Lord ST. LEONARDS, in Egerton v. Earl Brownlow, 4 H. L. Cas. 1, 237, 238: "My lords, there are just a few remarks that I wish to make upon public policy. I will not add a word to what has been already said by my noble and learned friends, but I will call your attention to what fell from one of the learned judges (Mr. Justice CRESSWELL) as regards the restraint of trade. That learned judge says that with regard to the restraint of trade, there is a

maxim in common law, and he refers to a case in Year Books (2 Hen. V, pl. 26), to prove it; but the learned judge did not tell your lordships upon what that maxim was founded. Nobody supposes that there was any statute upon the subject in those times. Upon what, then, was that maxim founded? Why, upon public policy for the good of the realm. It was not good for the realm that men should be prevented from exercising their trades. Now, let us see what this particular case is; it lies in few words, and remarkable consequences have resulted from it. It was an obligation with a condition that if a man did not exercise his craft of a dyer, within a certain town, that is, where he carried on his business, for six months, then the obligation was to be void, and it was averred that he had used his art there within the time limited, upon which Mr. Justice HULL, being uncommonly angry at such a violation of all law, said, according to the book, 'Per Dieu,' if he were here, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of the subject. I wish to draw your lordships' attention to this case. Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way with a particular object, is now perfectly legal. Without any exclamation of the judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Mr. Justice HULL was so very indignant at in that particular case. That shows, therefore, that the rule which the learned judge, whose opinion is now before the house, thought depended upon some rule of common law, regardless of policy, was founded upon public policy, and has been restrained and limited and qualified up to this very hour, and beneficially so, by that very policy which it is supposed had no bearing at all upon the foundation of the rule."

We add a reference to a few American authorities in support of the views we have expressed: "We are aware that it has been said that this (public policy) is in its nature uncertain and fluctuating; that it is difficult to determine its limits with any degree of exactness; that it is an unruly horse, which, once astride, you know not where it will carry; that it may lead from the sound law. And yet courts in all countries have more or less to do with it in all their deliberations. From the earliest times, contracts have been declared void because against public policy. It varies we know with the growth of society; it is being constantly modified and changed by the habits of our people and the usages of trade; and it is right that it should be so. And with these changes the courts must keep pace, not riding recklessly, but cautiously, and, if possible, safely; not being led 'from sound law,' but the more certainly to its just, true and enlightened exposition." Boardman v. Thompson, 25 Iowa, 487.

The court in Stanton v. Allen, 5 Den. 434, 442, says: "The counsel for the plaintiff referred to Richardson v. Mellish, 2 Bing. 229, to show that the doctrine respecting public policy as a defense was not to be encouraged or

extended. There is no doubt that it ought not to have been extended to that case. If, in examining what was there said by the judges, we confine ourselves to what was pertinent to the case, it will not be found in conflict with the doctrine to which I have referred." And again, in the same case, it is said: "Though the branch of the law relating to public policy is liable to be misunderstood and extended beyond its proper dimensions, still it must not on that account be neglected or disparaged. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of the state."

The importance of the doctrine to the welfare of the state may be appreciated by reflecting upon what the consequences would be if it should no longer be applied as a basis for judicial decisions, and all the various contracts which are now declared void because contrary to public policy should be enforced according to their terms. Says a writer in 17 Albany Law Journal, 465: "If all contracts were to be enforced without regard to the effect they would have upon the public good, the general welfare of society, it would be conducive of the utmost immorality and dishonesty. Legislatures could be bribed, markets cornered, marriages prevented, illegal divorces obtained, and the election franchise seriously impaired. Moreover, the courts would be compelled to allow compensation for the most pernicious practices."

In this connection the remarks of Mr. Greenwood on the general subject are worthy of reproduction: "The element of public policy in the law of contracts, and in the law generally, is by no means of recent origin, but owes its existence to the very sources from which our common law is supplied. In fact, it pervades it in every place we feel. Look into the law of constructive notice, and we find what one judge called 'an unruly horse' pursuing us; if we investigate the true reasons upon which the doctrine of respondeat superior is founded, we find this same thing all controlling. It is the same element which seals the lips of a counsel forever against any disclosure of confidential communications from his client; it protects the home by denying to either husband or wife the power to reveal the secrets told to each other; it secures the people against the corruption of justice or the public service, and places itself as a barrier before all devices to disregard public convenience. We feel its wholesome influence in the law of actions, where it forbids the survival of actions of a personal character; it is the corner stone of the whole structure of res judicata itself. We hear now and then complaints against the application of public policy to the law; that it is an usurpation of legislative power; that the legislature is the only competent guardian of the interests of the people, the only authorized interpreter of their sentiments, and that the power of the courts should be confined to such matters of policy as the legislature has dictated. Its defenders, however, have only to point with pride to the numerous rules of law which are based upon it to justify the actions of the courts." Greenwood Pub. Pol. 8.

4. State and national policy.—In *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 62 Fed. Rep. 904, the suit was to recover the amount of insurance paid by the plaintiff for the burning of an elevator located upon the defendant's right of way. The lease from the railroad company to the owners of the elevator provided that the company should not be liable for injury or

destruction of the building or its contents by reason of the negligence of the company or otherwise. The Supreme Court of Iowa, in which the elevator was situated, had held that the contract was not contrary to the public policy of that state. *Griswold v. Illinois Central R. Co.*, 9 Am. R. R. & Corp. Rep. 697. It was contended in the present suit that it was a question of national policy and not of state policy that was involved. The contract was sustained and upon the general subject of state and national policy the court says: "The subject-matter of the contract may be such that it affects the country at large, or it may be local in its nature. The nature of the subject-matter determines the source from which light must be sought upon the question of fact whether the provisions of a given contract are or are not contrary to public policy. In other words, there is a public policy of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the national government, and coextensive with the boundaries of the Union, and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state and applicable to all matters within state control. Thus, in *Greenhood on Public Policy*, it is said that any contract made by a competent party, upon valuable consideration, is valid, unless it binds the maker to do something opposed to the public policy of the state or nation. *Greenhood Pub. Pol.* 1, rules 1 and 2. In seeking to ascertain the requirements of the public policy of the nation the principal sources of information are the Constitution of the United States, the statutes enacted by congress and the decisions of the courts, federal and state; and in case there should be a divergence in the views of the federal and state courts upon a question of national public policy, the conclusion reached in the federal courts must be accepted as the best evidence of what the requirements of the national public policy are. On the other hand, when seeking to determine the public policy of the state towards a subject within state control the principal sources of information are the State Constitution and statutes and the decisions of the courts, state and federal; and, in case of a divergence between them, the decisions of the state court must be accepted as the best evidence of the public policy of the state."

5. Public policy favors freedom of contract — limitations of this principle.— In *Printing & Numerical Registering Co. v. Sampson*, L. R., 19 Eq. Cas. 462, 465, *JESSEL, M. R.*, says: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract." This language is adopted and approved by *FRY, L. J.*, in *Rousillon v. Rousillon*, 14 Ch. Div. 351, 365, and has been frequently quoted with approval, both in English and American cases relating to contracts in restraint of trade. "A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract." *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272; 47 N. W. Rep. 806. But this can mean no more than this, that public policy favors freedom of contract only so far as that freedom is not

used to the prejudice of the public. That you are not lightly to interfere with the freedom of contract means simply that you are not to interfere without some good and sufficient reason. But the fact that a contract is injurious to the public welfare is a good and sufficient reason, and so are all the authorities.

6. All contracts and undertakings contrary to public policy are void.

— This proposition admits of no doubt, and we need only refer to a few illustrations in these reports. *Board of Commissioners v. Taylor*, 1 Am. R. R. & Corp. Rep. 496; *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 534; *State v. Nebraska Distilling Co.*, 1 Am. R. R. & Corp. Rep. 604; *Conger v. New York, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 190; *West v. Camden & A. R. Co.*, 3 Am. R. R. & Corp. Rep. 109; *Western Union Tel. Co. v. Short*, 3 Am. R. R. & Corp. Rep. 564; *Cleveland, etc., R. Co. v. Closser*, 3 Am. R. R. & Corp. Rep. 686; *Brundred v. Rice*, 7 Am. R. R. & Corp. Rep. 357; *Florida Central, etc., R. Co. v. State*, 8 Am. R. R. & Corp. Rep. 94. “Whenever an agreement appears to be illegal, immoral or against public policy a court of justice leaves the parties as it finds them; if the agreement be executed the court will not rescind it; if executory, the court will not aid in its execution.” *Roll v. Rauget*, 4 Ohio, 400.

7. The violation of public policy must be clear to justify the application of the rule.— “The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.” *Richmond v. Dubuque & Sioux City R. Co.*, 26 Iowa, 191, 202. To the same effect is the language already quoted from *Richardson v. Mellish*, 2 Bing. 229, and this is in line with all the authorities. *Stanton v. Allen*, 5 Den 434, 441; *License Tax cases*, 5 Wall. 462, 469; 29 Alb. Law Jour. 308; *Greenhood Pub. Pol.* 116.

8. It is the tendency of the act or contract to injure the public, which determines its invalidity, and not the fact of injury.— *Greenhood* states the rule in this regard as follows: “It is the tendency of the class of contracts to which an agreement belongs, which determines its validity, and not the fact whether, in the particular case, it had any prejudicial effect.” *Greenhood Pub. Pol.* 5. As it has often been attempted to sustain particular contracts by showing or claiming that they have resulted beneficially to the public, we quote some expressions of opinion upon this point from cases in which such claim has been made and denied: “The law looks to the general tendency of such agreements, and it closes the door of temptation by refusing them recognition in any of the courts of the country.” *Tool Co. v. Norris*, 2 Wall. 45, 56.

“When a contract belongs to a class which is reprobated by public policy, it will be declared void, although in that particular instance no injury to the public may have resulted. The case must yield to the principle, not the principle to the case.” *Firemen’s Charitable Assn. v. Berghaus*, 13 La. Ann. 209, 210. “The end accomplished is not the test by which we are to judge of the validity of the contract, but rather the end aimed at by the parties.” *Weld v. Lancaster*, 56 Maine, 453, 458.

“The question of the validity of the contract does not, however, depend upon the circumstance whether it can be shown that the public has, in fact,

suffered any detriment, but whether the contract is, in its nature, such as might have been injurious to the public." *Holladay v. Patterson*, 5 Oreg. 177, 180. "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate." *Richardson v. Crandall*, 48 N. Y. 848, 362.

The same point has been adjudicated and similar views expressed in numerous other cases. *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 534, 557; *People ex rel. Peabody v. Chicago Gas Trust*, 1 Am. R. R. & Corp. Rep. 562; *State v. Nebraska Distilling Co.*, 1 Am. R. R. & Corp. Rep. 604; *State ex rel. Attorney-General v. Standard Oil Co.*, 5 Am. R. R. & Corp. Rep. 679; *People v. Sheldon*, 8 Am. R. R. & Corp. Rep. 581; *Chaplin v. Brown Bros.*, 83 Iowa, 156; 48 N. W. Rep. 1074; *Anderson v. Jett*, 89 Ky. 375; 12 S. W. Rep. 670; *Fuller v. Dame*, 18 Pick. 472; *Atcheson v. Mallon*, 43 N. Y. 147, 149; *Mills v. Mills*, 40 N. Y. 543; *DeWitt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 16 Daly, 529; 14 N. Y. Supp. 277; *Crawford v. Wick*, 18 Ohio St. 190; *Texas Standard Cotton Oil Co. v. Slone*, 83 Tex. 650; 19 S. W. Rep. 274; *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 334.

9. **Whether a contract is opposed to public policy is a question of law for the court and not of fact for the jury.**—In *Pierce v. Randolph*, 12 Tex. 290, the trial court submitted the question to the jury, and this was held to be error. All the cases proceed upon the assumption that the question is one of law, and it would appear that no attempt has been made to treat it otherwise, except in the above case. *Greenhood Pub. Pol.* 123; 29 Cent. Law Jour. 309.

10. **The objection that a contract is contrary to public policy may be taken at any stage of the proceedings, and by the court of its own motion.**—"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." *Coppell v. Hall*, 7 Wall. 542, 558, 559. To the same effect is *Oscanyan v. Arms Co.*, 103 U. S. 261, where it was held sufficient if the illegality appears from the opening statement of counsel. In *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 534, the parties not only did not raise the point, but were apparently anxious to suppress it. The court, however, took it up of its own motion and held the contract in question to be illegal. CHAMPLIN, J., says: "It is not necessary that the parties, or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves." P. 557.

RICHARDS V. AMERICAN DESK & SEATING Co.

(Supreme Court of Wisconsin, April 10, 1894.)

1. **CONTRACTS IN RESTRAINT OF TRADE. GENERAL RULE AS TO VALIDITY. REASONABLENESS.** Contracts in restraint of trade are void, as being against public policy, unless founded upon a valuable consideration, and limited, as regards time, space and the extent of the trade, to what is reasonable under the circumstances of the case, for the reason that they tend to deprive the public of the services of the parties in the employments and capacities in which they are most useful, and that they tend to expose the public to the evils of monopoly.

2. **TEST OF REASONABLENESS.** The test as to whether the restraint is reasonable or not is, whether the restraint is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public.

3. **REASONABLENESS A QUESTION OF LAW.** Whether a restraint is reasonable in any given case is a question, not of fact, but of law for the court.

4. **PRESUMPTION AS TO VALIDITY.** All restraints are presumptively bad, if nothing more appears, but if the facts and circumstances are set forth or made to appear, then the court is to judge whether it is reasonable or not.

5. **PARTY RELYING UPON CONTRACT IN RESTRAINT OF TRADE MUST AVER FACTS TO SHOW IT REASONABLE.** Plaintiff's assignor and defendant were corporations engaged in manufacturing and selling school and other furniture. They entered into an agreement by which defendant agreed to purchase of plaintiff's assignor \$200,000 worth of furniture and the latter agreed not to sell such furniture in parts of Wisconsin and Michigan and some thirty other states and territories, and defendant agreed not to trade in the remainder of the United States. In an action for goods sold and delivered, defendant set up this contract, and alleged breaches of it as a counterclaim. There was nothing to show the ordinary amount of manufacture and sale by either party, or that defendant had established a trade in more than one state out of the thirty. Held, that the pleading was demurrable in not affirmatively showing that the restraint was reasonably necessary to protect defendant's interest under the contract.

ACTION by William D. Richards, assignee, etc., against American Desk and Seating Company. From an order overruling a demurrer to defendant's counterclaim, plaintiff appeals.

The plaintiff sues as assignee of the Manitowoc Manufacturing Company, a Wisconsin corporation, which was engaged in the manufacture and sale of school, church and opera house furniture, and other furniture and specialties, and the defendant is an Illinois corporation, and during the times named in the pleadings

was engaged in buying, selling and manufacturing the same kinds of furniture. The action is brought for the recovery of \$10,000 for goods, wares and merchandise of the kind above mentioned, sold and delivered by the plaintiff's assignor to the defendant. The defendant set up two counterclaims for damages, in all in the sum of \$370,000, for alleged breaches of two certain written agreements executed by the plaintiff's assignor and the defendant; one of them, dated February 8, 1889, was to terminate February 1, 1894, and the other and material one was made June 18, 1890, and was to continue in force until December 31, 1894. The question presented was whether these contracts were valid or void as against public policy, as being in restraint of trade. By the first contract it was agreed that the plaintiff's assignor should make, in such quantities and kinds as might be ordered by the defendant, and deliver the same free on board at Chicago, Ill., opera and church chairs, pews, settees, bank, church, hall, lodge, office, store and school furniture, including store stools, measuring machines, goods and book shelves, and other specialties, all of which were "to be made for and sold to the defendant only, during the term of this contract," and the defendant agreed "to purchase \$250,000 worth of goods under this contract" of the plaintiff's assignor. By the second contract the plaintiff's assignor was to make and deliver to the defendant, free on board at Chicago, goods manufactured by it, in such quantities and kinds as might be ordered by the defendant, of substantially the same character as provided in the first contract, and the orders of the defendant were to have a preference over all other work. After making provisions with regard to patterns and other matters not material to the present question, it was stipulated that the prices to be paid by the defendant, except for the iron parts or castings, should not exceed the prices charged by any other responsible manufacturer for like goods, and prices were specified for the iron parts. It was agreed that, if the plaintiff's assignor fulfilled the covenants on its part, the defendant should purchase of the plaintiff's assignor "during the period of this contract, and under its terms, goods or other articles to the amount of not less than \$200,000," specifying the time and manner of payment for the same, and that, "during the term of this contract, the party of the first part (plaintiff's assignor) shall not sell, either

directly or indirectly, any of the goods or articles of the several kinds hereinbefore agreed to be made for and delivered to the party of the second part, within the following described territory, west of and including the following counties in Wisconsin: Ashland, Price, Taylor, Clark, Jackson, Monroe, Vernon and Richland, and south of and including the following counties: Iowa, Dane, Jefferson, Waukesha and Milwaukee; in Michigan, all the territory south of and including the following counties: Muskegon, Kent, Montcalm, Gratiot, Saginaw, Tuscola and Huron; and all of the following named states and territories: Illinois, Indiana, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Indian Territory, Texas, New Mexico, Colorado, Wyoming, Montana, Washington, Idaho, Oregon, Nevada, Utah, California, Arizona and Mexico. Nor shall the party of the first part, during the term of this contract, sell any of said goods or articles to any person, firm or corporation whom it knows, or has good reason to believe, intends to resell the same within said territory." It was further agreed "that, during the term of this contract, the party of the second part (the defendant) shall not sell, either directly or indirectly, any of the goods or articles of the several kinds hereinbefore agreed to be made for and delivered to it (except as hereinafter expressly provided) within the following described territory: In Wisconsin, all of the territory east of the following counties: Ashland, Price, Taylor, Clark, Jackson, Monroe, Vernon and Richland, and north of the following counties: Iowa, Dane, Jefferson, Waukesha and Milwaukee; in Michigan, all of the territory north of the following counties: Muskegon, Kent, Montcalm, Gratiot, Saginaw, Tuscola and Huron; and all of the following states and territories: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Virginia, North Carolina, Tennessee, Kentucky and Ohio. Nor shall the party of the second part, during the term of this contract, sell any of said goods or articles to any person, firm or corporation whom it knows, or has good reason to believe, intends to resell the same within said last-described territory; provided, however, and it is expressly agreed, that the party of the second part, or its agents,

may sell in any part of the United States the desk known as the 'Yale desk,' school apparatus and settees, and bank, office and store furniture, and that any sale of said Yale desk, or any school apparatus or settees, or any bank, office or store furniture, in any state or territory by the party of the second part, or any of its agents, shall not be deemed a violation of this contract or any of its provisions. * * * A sum equal to twenty-five per cent of the amount of any sale made by either of the parties in violation of the provisions of the contract, as liquidated damages, and not as a penalty, shall be paid by the party making any such sale, to the other party, but the delivery by either of the parties within the territory of the other, under and in performance of any existing contract, shall not be construed as a violation of this contract." It was further agreed that each of the parties should transfer to the other any agency or agencies it might then have, and the good will of any business it may have established, within the territory of the other as thus defined; the plaintiff's assignor was to pay to the defendant a commission of five per cent on the amount received for any goods or articles which might be thereafter delivered by it to any person, firm or corporation within the territory of the party of the second part, under any then existing contracts; and, further, that the first-named contract should not be in force thereafter, but that this contract or any of its provisions should not be construed "as waiving or releasing, or in any way impairing, any claim or right of action either party may have against the other under and by reason of said contract of February 8, 1889, or otherwise."

The first counterclaim is for damages for neglecting and refusing to manufacture \$100,000 worth of goods ordered under the last-named contract, in the amount of \$25,000, and for a claim for mistakes in filling orders, for not replacing castings that were imperfect and broken, and unreasonably delaying the shipment of goods ordered, the sum of \$5,000, and in the sum of \$3,000 for patterns not paid for or returned, furnished by the defendant under the second contract; twenty-five per cent liquidated damages on damages sustained by the sale of nearly all the different kinds of manufactured goods specified in the contract in the defendant's district during the years 1890, 1891, 1892, in the state of Illinois, on sales amounting to \$40,000;

in Indiana, \$10,000; South Carolina, \$5,000; Georgia, \$10,000; Florida, \$10,000; Alabama, \$5,000; Mississippi, \$5,000; Louisiana, \$7,000; the state of Wisconsin, \$10,000; Missouri, \$15,000; Iowa, \$10,000; Minnesota, \$15,000; North Dakota, \$5,000; South Dakota, \$5,000; Nebraska, \$10,000; Kansas, \$15,000; Indian Territory, \$1,000; Texas, \$15,000; New Mexico, \$4,000; Colorado, \$10,000; Wyoming, \$5,000; Montana, \$8,000; Washington, \$15,000; Idaho, \$5,000; Oregon, \$10,000; Nevada, \$5,000; Utah, \$7,000; California, \$25,000; Arizona, \$3,000; Mexico, \$5,000; in territory in Wisconsin, in which it agreed not to sell, \$20,000; in like forbidden districts in the state of Michigan, \$50,000; in all, amounting to \$365,000, upon which damages were claimed in the sum of \$91,250. The second counterclaim was for the sum of \$5,000, founded upon a provision of the second contract above, to the effect that the plaintiff's assignor should pay to the defendant a commission of five per cent on the amount the plaintiff's assignor received for any goods or articles which it might thereafter deliver to any person, firm or corporation within the defendant's territory under any then existing contracts, and which, in effect, was a part consideration for the defendant's stipulations; and it was alleged that the defendant had sold and delivered, for the plaintiff's assignor, such goods, wares, etc., to the amount of \$100,000, and that it was entitled by the terms of said contract to a commission of five per cent, amounting to \$5,000. The plaintiff demurred separately to each of these counterclaims, on the ground that it did not state facts sufficient to constitute a defense, nor sufficient to constitute a counterclaim. The Circuit Court made an order overruling the demurrers, from which the plaintiff appealed.

Nash & Nash, for appellant. *Markham & Markham*, for respondent.

PINNEY J. (*after stating the facts*). The agreement in question is in partial or limited restraint of the trade of both of the parties to it in certain lines of articles which were to be manufactured and sold by the plaintiff's assignor to the defendant, up to the amount of \$200,000, and during a period of less than four years. By the terms of the agreement the plain-

tiff's assignor was prevented from selling, directly or indirectly, any other like articles of its manufacture during that time in a large part of Wisconsin and of Michigan, and in any part of thirty other states and territories of the United States, and a like restraint was imposed on the defendant as to the remainder of Wisconsin and Michigan, and all the other states of the Union. Both counterclaims are founded upon, and grow out of, the alleged breaches by the plaintiff's assignor of provisions of this contract, and are dependent upon its validity, but the more important one relates to a claim to recover twenty-five per cent of the amount of sales alleged to have been made by the plaintiff's assignor within said period in the territory set apart exclusively to the defendant for making sales of such articles. It will be seen from the statement of the case that the restraint against the plaintiff's assignor, alleged to have been violated, was total in all the states and territories named in it, except Wisconsin and Michigan, where it extended to parts only of those states, but it was limited in respect to the time it was to continue. That any agreement in restraint of trade of one of the parties to a contract is void, as being against public policy, unless founded upon a valuable consideration, and limited, as regards time, space and the extent of the trade, to what is reasonable under the circumstances of the case, is well settled, for the reason that such contracts tend to deprive the public of the services of parties in the employments and capacities in which they are most useful, and that they tend to expose the public to the evils of monopoly. *Kellogg v. Larkin*, 3 Pin. 123; *Laubenheimer v. Mann*, 17 Wis. 561; *Alger v. Thacher*, 19 Pick. 51; *Bishop v. Palmer*, 146 Mass. 469, 473; 16 N. E. Rep. 299; *Navigation Co. v. Winsor*, 20 Wall. 66, 67; *Gibbs v. Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Lange v. Werke*, 2 Ohio St. 519; *Telegraph Co. v. Crane*, (Mass.) 35 N. E. Rep. 98. These cases show, and many others might be cited to the same effect, that it is essential, in order not to be unreasonable, that the restraint imposed must not be larger than is plainly required for the protection of the party with whom the contract is made, and whether it is reasonable in a given case is a question, not of fact, but of law for the court. *Poll. Cont.* 366-368; *Washburn v. Dosch*, 68 Wis. 440; 32 N. W. Rep. 551. The test as to whether the restraint is reason-

able or not is well expressed in the often-cited case of *Horner v. Graves*, 7 Bing. 735, 743, where it is said: "The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable." It is said, in substance, in many cases, that all restraints are presumed to be bad, but, if the circumstances are set forth, that presumption may be excluded, and the court is to judge of these circumstances whether the contract be valid or not. *Taylor v. Blanchard*, 13 Allen, 373; *Callahan v. Donnolly*, 13 Am. Rep. 172, and note; *Mallan v. May*, 11 Mees. & W. 853; *Lange v. Werke*, 2 Ohio St. 519; *Kellogg v. Larkin*, 3 Pin. 123; *Machine Works v. Perry*, 71 Wis. 495, 499, 501; 38 N. W. Rep. 82. It is held, in substance, in these cases, that the pleading will be bad on demurrer if it does not appear from the contract or averments of extrinsic facts that the restraint was reasonable. This is in accordance with the great weight of authority, and seems to be the necessary result of the rule as to the validity of such restraint. The great diffusion of wealth, the wonderful advances made in the methods and facilities for manufacturing and carrying on commerce, the manifold improvements in machinery, and in the adaptation of steam and electricity as motive powers, have enlarged or opened numerous fields of industry, and wrought marvelous changes, and the tendency of the later cases has been in relaxation of the earlier rule in relation to contracts in restraint of trade. The most liberal and advanced doctrine on the subject in this country is found in the case of *Match Co. v. Roeber*, 106 N. Y. 473; 13 N. E. Rep. 419, in which the history of the law is elaborately considered, and a covenant excluding a manufacturer of matches who has sold his property, stock, etc., from engaging in the manufacture and sale of matches for a period of ninety-nine years within any of the states and territories, except Nevada and Montana, was sustained. But it appeared in that case that before such sale he had carried on the business of manufacturing friction matches, "and of selling the same in the several states

and territories of the United States, and in the District of Columbia," and so the case really came within the rule under consideration, and the restraint was reasonably necessary to protect the other party in his purchase, in view of the circumstances disclosed. *Tode v. Gross*, 127 N. Y. 485; 28 N. E. Rep. 469, was in relation to a restraint imposed upon the vendor of a business founded on a secret process, but it recognizes and sustains the general rule. A manufacturing business founded upon the use of a secret process, or the use of patented processes or means, is not understood to be within the rule. The cases of *Leather Cloth Co. v. Lonsont*, L. R., 9 Eq. 345, and *Rousillon v. Rousillon*, 14 Ch. Div. 351, are understood to represent the more modern views of the law on this subject in England. In the former case it was said: "All restraints upon trade are bad as being in violation of public policy, unless they are actually and not unreasonably for the protection of parties in dealing legally with some subject-matter of the contract." The same subject was considered in the somewhat recent case of *Davies v. Davies*, 36 Ch. Div. 359, in which *COTTON*, L. J., held the law to be "that a limited restraint may be good, provided the restraint is reasonable, and such as was required for the protection of parties with whom the covenant is entered into," and that the rule ought not to be altered but by the House of Lords; and *BOWEN*, L. J., held substantially the same view, and notices that in that case the court had no materials for deciding that the covenant in question was beneficial to the public, or reasonably necessary for the protection of the covenantee, and, in substance, that to sustain it would be "leaping into the dark;" while *FRY*, J., was inclined to adhere to his decision in *Rousillon v. Rousillon*, *supra*, and hold that the burden of proof as to the validity of the restraint is shifted by showing that it has been entered into for the protection of the interests of one of the contracting parties.

The counterclaims and second contract, made an exhibit thereto, are exceedingly meager, and wholly insufficient to show that the agreement of restraint insisted on by the defendant was reasonably necessary for the protection of its interests under the contract. While it appears, by implication, that the respective parties may have agencies in the territory set apart to each for the sale of the line of goods and wares mentioned in the contract,

there is nothing to show the amount of annual output of these goods and wares by the plaintiff's assignor, or of the ordinary amount of manufacture and sale by either party, or that the defendant had established or carried on any trade in more than one state out of the thirty states and territories to which the restraint it seeks to enforce extends, and in respect to which it charges violations of this restraint by the plaintiff's assignor. The counterclaims wholly fail to show that the defendant's interest for less than four years in the sale and disposition of \$200,000 in value of the goods and wares mentioned, even upon the most liberal view of the subject, and under the existing state of trade and competition, would justify the very extensive restraint relied on. It follows from these views that, upon the face of the pleadings, it is not made to appear that the contract was a reasonable and valid one, and, therefore, the portions of the order appealed from are erroneous. The parts of the order of the Circuit Court appealed from are reversed, and the cause is remanded, with directions to sustain the plaintiff's said demurrers to the counterclaims.*

CONTRACTS IN RESTRAINT OF TRADE CONSIDERED WITH REFERENCE TO THE BEARING OF THE PRINCIPLES INVOLVED UPON THE VALIDITY OF POOLS AND TRUSTS.

A. HISTORICAL VIEW OF CASES AND DOCTRINES.

B. CONCLUSIONS — RULE AS TO GENERAL AND PARTIAL RESTRAINTS.

C. VALIDITY OF RESTRAINTS — GENERAL PRINCIPLES — REASONABLENESS THE TEST.

D. REASONABLENESS AS RESPECTS THE PARTIES.

E. REASONABLENESS AS RESPECTS THE PUBLIC — CASES CLASSIFIED AND CONSIDERED WITH RESPECT TO THEIR EFFECT UPON TRADE.

F. CONTRACTS AND RESTRAINTS ENTERED INTO FOR THE PURPOSE, OR WHICH HAVE THE EFFECT, OF DOING AWAY WITH EXISTING COMPETITION.

G. VALIDITY OF RESTRAINT AS AFFECTED BY THE NATURE OF THE BUSINESS RESTRAINED.

H. MISCELLANEOUS QUESTIONS.

1. Purpose of the note.—The subject of contracts in restraint of trade does not fall strictly within the purview of these reports. The law and decisions on the subject are, however, much considered and discussed in cases relating to trust and trade combinations, and we have essayed to include the subject of such combinations, which are frequently, if not generally, affected, through an association or consolidation of corporations, or other corporate

* Reported in 87 Wis. 503; 58 N. W. Rep. 787.

action. We shall endeavor to present in this note such phases of the subject as have a bearing upon the questions growing out of such combinations, which are occupying more and more the attention of the courts, of the legislatures and of the students of social and political economy. Questions relating to the validity of such contracts are particularly considered, though some other questions are briefly discussed.

A. HISTORICAL VIEW OF CASES AND DOCTRINES.

2. Early doctrine — all restraints of trade void.— “There was an early period in English history,” says BOWEN, L. J., in *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630, 651, “when the courts set their face apparently against all restrictions upon trade alike, whether limited or unlimited.” In a case decided in 1415, suit was brought upon a bond with a condition that if the obligor did not exercise his trade of a dyer within a certain town for six months, then it should be void, otherwise, in full force. The court, by Mr. Justice HULL, held the bond to be void as against the common law, and, as has been observed, made his name immortal in the books by exclaiming in his anger: “By God, if the plaintiff were here, I would send him to prison until he paid a fine to the king for daring to restrain the liberty of the subject.” Year Book, 2 Hen. V, 5, pl. 26. See comments on this case by Lord ST. LEONARDS in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1. As late as 1601, it was held, in *Colgate v. Bachelor*, Cro. Eliz. 872, to be against law to prohibit or restrain “any to use a lawful trade at any time or any place.” That such was the early common law seems to be universally conceded, and many modern cases have recognized the fact. *Wright v. Ryder*, 36 Cal. 342; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 81 Pac. Rep. 581; *Alger v. Thacher*, 19 Pick. 51; *Herreshoff v. Bontineau*, 17 R. I. 3; 19 Atl. Rep. 712; *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630.

The reasons assigned for this early doctrine have been stated as follows: “At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth and to prohibit contracts which tended to abridge them. Hence, the rule first established was that all contracts were void which in any degree tended to the restraint of trade, even in a particular circumscribed locality, either for a definite or unlimited period. But as population and trade increased, and there was, consequently, a greater competition in all useful pursuits, the necessity for the stringent rule which before prevailed had in a greater measure ceased, and the rule itself was greatly relaxed and modified. Instead of denouncing as void all contracts in restraint of trade, the rule, as relaxed, tolerated such as were restricted in their operation within reasonable limits.” *Wright v. Ryder*, 36 Cal. 342, 357. And in another case: “Formerly, in England, the courts frowned with great severity upon every contract of this kind. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship. Hence, if a person was prevented from pursuing his particular trade, he was practically deprived of all means of earning a livelihood, and

the state was deprived of his services." *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272; 47 N. W. Rep. 806. See, also, *Spelling on Trusts*, § 4.

3. Later doctrine — all general restraints void — partial restraints valid if reasonable.—The earliest case in which a contract in restraint of trade was held valid is that of *Rogers v. Parry*, 2 Bulst. 136, decided in 1618. This was followed in 1620 by *Broad v. Jollyfe*, Cro. Jac. 596. In these cases contracts not to carry on business in a particular place were held valid. It is probable that the first departure from the ancient common law was to sanction restraints from carrying on a particular trade in a particular shop or street. See remarks of BOWEN, L. J., in *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 655. About a century after *Rogers v. Parry* was decided Chief Justice PARKER rendered an opinion, in *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Smith's Lead. Cas. (Pt. 1) *507, (7th Am. ed.) 705 (1711), in which all the cases were reviewed and which was accepted as authoritative, both in its dicta and adjudicata, for more than a century afterwards. The Supreme Court of the United States has referred to it as "the foundation of the rule in relation to the invalidity of contracts in restraint of trade." *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409; *Fowle v. Park*, 131 U. S. 88, 96. The action was upon a bond with a condition "that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond street, in the parish of St. Andrews, Holborn, for the term of five years; now, if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void." The defendant prayed oyer of the condition and pleaded that he was a baker by trade; that he had served an apprenticeship therein and that, by reason thereof, the bond was void in law. The plaintiff demurred. The court sustained the demurrer and gave judgment for the plaintiff. PARKER, Ch. J., says: "The general question upon this record is, whether this bond, being made in restraint of trade, be good? And we are all of opinion that a special consideration being set forth in the condition, which shows that it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is not between promises and bonds, but between contracts *with* and *without* consideration; and that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz., where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by." The chief justice then proceeds "to state the law" upon the subject and "to reconcile the jarring opinions." The result of this "endeavor," so far as contracts in restraint of trade are concerned, may be summed up as follows: First, general restraints, or restraints extending to the whole kingdom, are void; second, particular restraints, or restraints as to particular persons or places, if made upon a good and adequate consideration and under circumstances which show that it was reasonable for the parties to enter into them, are valid; third, all contracts in restraint of trade, if nothing more appears, are presumed to be

bad. Only the second of these propositions was adjudicated in the case before the court, and what was said upon the other points was dictum only.

As already remarked, the conclusions of Chief Justice PARKER were accepted as law for more than a century following their announcement, and no case appears in conflict therewith until we come to *Whittaker v. Howe*, 3 Beav. 383, decided in 1841. Contracts in general restraint of trade were uniformly regarded as void, but restraints limited in extent and reasonable in fact were sustained. A few of the cases are referred to for illustration. *Horner v. Ashford*, 3 Bing. 322 (1825); *Archer v. Marsh*, 6 A. & E. 959; 33 E. C. L. R. 498 (1837); *Hitchcock v. Coker*, 6 A. & E. 438; 33 E. C. L. R. 241 (1837); *Goodman v. Henderson*, 58 Ga. 567; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344 (1845); *Pierce v. Fuller*, 8 Mass. 223; *Palmer v. Stebbins*, 3 Pick. 188; *Pierce v. Woodward*, 6 Pick. 206; *Lange v. Werke*, 2 Ohio St. 519; *Curtis v. Gokey*, 68 N. Y. 300; *Kellogg v. Larkin*, 3 Pin. (Wis.) 123; 3 Chand. 133. During this period—from 1711 to 1841—numerous cases were decided in which restraints, covering much more territory than the covenant passed upon in *Mitchell v. Reynolds*, were sustained. In many cases the restraints held valid extended to an entire city or town, or even county. In 1793 a covenant by a physician not to practice within ten miles of where the plaintiff lived, was held valid in *Davis v. Mason*, 5 T. R. 118. So in *Haywood v. Young*, 2 Chitty, 407 (1818), a covenant not to practice as a surgeon or man-midwife in a specified town, or within twenty miles thereof, was upheld. Covenants similar in extent have been frequently sustained. *Proctor v. Sargent*, 2 Scott N. R. 289 (1840); *Butter v. Burleson*, 16 Vt. 176 (1844); *Cook v. Johnson*, 47 Conn. 175 (1879); *Noble v. Bates*, 7 Cow. 307 (1827); *McClurg's Appeal*, 58 Penn. St. 51 (1868). In *Whitney v. Slayton*, 40 Maine, 224 (1855), a covenant not to carry on the business of an iron founder within sixty miles of Calais was held not unreasonable in extent.

As early as 1803 a covenant by an attorney not to practice in London, or within 150 miles of there, was held valid in *Bunn v. Guy*, 4 East, 190. In *Tallis v. Tallis*, 1 El. & Bl. 391; 72 E. C. L. R. 390 (1853), a covenant not to prosecute a certain business in London or within 150 miles of the general post office therein, or in Dublin or Edinburgh, or within fifty miles of either place, or in any town in Great Britain or Ireland where the plaintiffs had an established agency within six months preceding the agreement, was sustained; and also in *Havens v. Parsons*, 32 Beav. 328 (1863), a covenant not to carry on a certain business within 200 miles of Birmingham.

So restraints, extending to the whole of a carrier's route, though 100 miles or more in length, were held valid so far as extent was concerned. *Chappel v. Brockway*, 21 Wend. 157 (1839); *Pierce v. Fuller*, 8 Mass. 223 (1811); *Palmer v. Stebbing*, 3 Pick. 188 (1825). But general restraints were held void, as well as partial restraints, covering an unnecessary extent of territory. *Ward v. Byrne*, 5 M. & W. 547 (1839); *Alger v. Thacher*, 19 Pick. 51 (1837); *Horner v. Graves*, 7 Bing. 735 (1831).

4. Modern doctrines—tendency to ignore the distinction between general and partial restraints—English cases.—In *Whittaker v. Howe*, 3 Beav. 333, decided in 1841, a covenant by an attorney not to practice anywhere in Great Britain for twenty years was held valid. The test adopted

was that laid down by TINDALL, Ch. J., in *Horner v. Graves*, 7 Bing. 735, 748, that the restraint may be whatever is necessary to afford a fair protection to the party in whose favor it is given, provided that it is not injurious to the public. BOWEN, L. J., in a review of the cases, refers to *Whittaker v. Howe* as "the first cloud upon the clear sky of the common-law narrative." In *Mallan v. May*, 11 M. & W. 652 (1843), the plaintiffs took the defendant to instruct and to assist in the business of a surgeon dentist in London, for a period of four years, and the defendant agreed that after the expiration of this time he would not carry on the business in London, or in any town in England or Scotland where the plaintiffs had carried on business before the expiration of the service. The covenant was held good as to London and bad as to the other part, because unnecessary for the protection of the plaintiffs, and, therefore, unreasonable and oppressive. The principle was laid down that if the restraint is no larger than is necessary for the protection of the party with whom it is made it is valid. In *Green v. Price*, 13 M. & W. 694 (1845), A and B were partners in the perfumery business. B sold out his interest to A and gave a bond not to carry on the same business in London or Westminster, or within 600 miles thereof. The breach was that B had set up the business in London. It was held that the covenant was divisible, and was valid as to London. It was, therefore, not necessary to pass upon the other branch of the covenant, but it was conceded to be invalid. No facts appeared to show that it was reasonable. The case was affirmed in Exchequer Chamber. *Price v. Green*, 16 M. & W. 346 (1847).

In *Tallis v. Tallis*, 1 El. & Bl. 391; 72 E. C. L. R. 390 (1853), plaintiff and defendant had been partners in a book publishing business including a canvassing trade. The plaintiff bought out defendant's interest and the latter covenanted not to engage in the business of a canvassing publisher in London or within 150 miles of the general post office therein, nor in Dublin or Edinburgh or within fifty miles of either place, nor in any town in Great Britain or Ireland in which an agency existed. The covenant was sustained. It was said that there must be some limit in space, but also that "the contract is valid unless some restriction is imposed beyond what the interest of the plaintiff requires; and his interest has been considered to extend very far." In *Harms v. Parsons*, 32 Beav. 328 (1863), a covenant, in connection with the sale of a business, that defendant would not carry on the business of a horse hair manufacturer within 200 miles of Birmingham, was upheld, though the covenant extended to all of England and Wales, except Cornwall and parts of Scotland and Ireland. The court observed: "If the nature of the trade require it the extent excluded may be very great indeed."

On the sale of a magazine called *Bentley's Miscellany* the vendor covenanted not to publish, carry on or conduct any periodical of a like nature, such restriction not to include scientific or professional periodicals nor a quarterly review. The covenant was held valid. *Ainsworth v. Bentley*, 14 Weekly Rep. 630 (1866). To the same effect is *Ingram v. Stiff*, 5 Jur. (N. S.) 947 (1859).

In the case of *Leather Cloth Co. v. Lorisont*, L. R., 9 Eq. Cas. 345 (1869), it appeared that the defendant and others sold to the plaintiff certain patents obtained in France and England, for the manufacture of leather cloth, the right to obtain patents therefor in all other countries of Europe, also their

plant and business and stock of raw material and manufactured product situated at West Ham, England, and the defendant covenanted as follows: "The parties of the first part, or any of them, will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe any company or manufactory having for its object the manufacture or sale of productions which are the subject of the said letters patent, and now manufactured in the business or manufactory so carried on at West Ham, as aforesaid, and will not communicate to any person the means or process of such manufacture, so as in any way to interfere with the exclusive enjoyment by the said intended company of the benefits hereby agreed to be purchased." The covenant was sustained, partly on the ground that the transaction was the sale of a trade secret and partly on the ground that the restraint was not greater than the nature and extent of the business warranted. This case has been cited in support of the proposition that a restraint is not necessarily bad though it extend to the whole kingdom, and much of the reasoning favors this view. On the other hand, WICKENS, V. C., in *Allsopp v. Wheatcroft*, L. R., 15 Eq. 59; COTTON, L. J., in *Davis v. Davis*, 36 Ch. Div. 359, 384, 385, and BOWEN, L. J., in *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 3 Ch. 659, treat the decision as one founded upon the sale of a trade secret.

In *Rousillon v. Rousillon*, 14 Ch. Div. 351 (1880), the plaintiffs were engaged in the champagne trade, and their business extended throughout England, Scotland, France, Belgium and elsewhere. They employed defendant upon a salary, and he covenanted not to engage in the champagne trade for ten years after leaving the plaintiffs' employ. The covenant was held valid, and the test laid down in *Hitchcock v. Coker*, 6 A. & E. 438, and already referred to, was adopted. It was held that there is no hard and fast rule that a restraint unlimited as to space is void.

In *Davis v. Davis*, 36 Ch. Div. 359 (1887), the question arose as follows: A retiring partner, who received a large sum of money for his interest in the business, covenanted "to retire from the partnership, and, so far as the law allows, from the business, and not to trade, act or deal in any way so as directly or indirectly to affect the continuing partners." The business consisted of the manufacture of galvanized iron, and had been carried on at Wolverhampton and London. On a bill to enjoin the retiring partner from carrying on the same business in Middlesex, Justice KEKEWICH upheld the covenant and granted an injunction. In course of his opinion he said: "There are many circumstances familiar to us all, and some of them connected with politics rather than with policy, which have materially altered the relative position of rivals in trade and of the public whom traders supply. Railways, electric telegraphs and telephones have all exercised an influence, and quite recently the parcels' post, to say nothing of many other novelties, has introduced new elements into competition. I make these remarks because to my mind they go a long way to explain the difference between earlier and later decisions. Judges have been bound to recognize not merely the old decisions, but the principles on which they were founded, and yet, regarding public policy as the principle overriding all, they have struggled to adapt these older decisions to the changed circumstances of the day. There has, I

think, been a steady though irregular progress from the stricter rules of the last century, and perhaps it has not yet reached its limit." His position was that the only question is whether the covenant is reasonable, and, if so, it may be unlimited both as to time and space. On appeal all the justices, COTTON, BOWEN and FRY, concurred in holding that the covenant was too vague to be enforced. COTTON, L. J., went further and held that the old rule obtained, and that an absolute and unlimited covenant is void. BOWEN, L. J., seemed rather to agree with COTTON, L. J., upon this point, but thought it unnecessary to decide the question, while FRY, L. J., inclined to side with Justice KEKEWICH, but refrained from positively committing himself.

In *Badische Anilin & Soda Fabrick v. Schott*, (1892) 3 Ch. 447, the plaintiffs, having their principal place of business on the Rhine, were engaged in the manufacture and sale of aniline colors, tar products and the like. They had agencies in numerous foreign countries and did a world-wide business. The defendants were their agents for the north of England and located at Manchester. In consideration of their employment, they covenanted that for three years after the termination of their agency they would not enter any similar business, or start a business of that kind themselves, or give any information of any kind about the business. The agency was terminated and the defendants set up the same business on their own account. The covenant was held valid. The decision is by CHITTY, J., who says: "The result of the authorities down to the present time on this question of a covenant in restraint of trade appears to be as follows: When the restraint is general, that is, without qualification, it is bad as being unreasonable and contrary to public policy; when it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable, and, if reasonable, it is good in law."

In *Moenich v. Fenestre*, 61 L. J. Ch. 737 (1892), the plaintiff was a commission merchant and employed the defendant upon a salary, and the latter agreed that in case of the determination of the employment he would not for five years thereafter, either as principal, agent, clerk or otherwise, engage in any trade or business in the United Kingdom in connection with any kind of goods of continental manufacture which the plaintiff "shall have dealt in at any time previously to such determination." It appears that the plaintiff's business was widely diffused and that he did business and had customers in all parts of the kingdom. The covenant was held valid by STIRLING, J., in the Chancery Division, and his decision was unanimously affirmed in the Court of Appeals. LORRE, L. J., said: "The objection was taken that this clause was too wide because it extended over the United Kingdom. That objection fails for this reason: In considering the validity of this agreement, we must have regard to the business of the plaintiff. But the plaintiff's business is one which extends from one end of the United Kingdom to the other. Therefore, the restraint is not unreasonable, because it is necessary for the protection of the plaintiff's business." P. 741.

Lastly, we have the important case of *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630, decided by the Court of Appeals in 1893 and affirmed by the House of Lords July 31, 1894, (1894)

App. Cas. 535. The defendant was interested in several lines of business including the business of manufacturing guns and ammunition. In 1866 the defendant sold the latter business, together with certain patents pertaining thereto, to the Nordenfeldt Company, which had been organized to carry it on, for about the sum of \$1,500,000, and in 1888 the latter company sold the same to the plaintiff company. At the same time defendant and the plaintiff made an agreement by which he was to act as its managing director for seven years at a fixed salary and a certain percentage besides, and the defendant covenanted as follows: "The said Thorsten Nordenfeldt shall not, during the term of twenty-five years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gun powder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper." The defendant was a large stockholder in the plaintiff company and acted as its managing director until 1890, when, owing to some difficulty with the company, he withdrew and made an arrangement with a Belgium company to work for them in the manufacture of arms, guns and ammunition, in violation of his covenant. On a bill to restrain the defendant from such violation, it was held that the covenant was divisible and that the part as to not engaging in any business in competition with that carried on by the plaintiff could be put aside as not material to the controversy; that the remainder of the covenant, though unlimited in space, was reasonable under the circumstances and not against public policy, and that the plaintiff was entitled to have it enforced. Justices LINDLEY, BOWEN and SMITH delivered opinions. Justice LINDLEY placed his decision upon the following grounds: "(1) The covenant is severable; and if, as I think is the case, the covenant is too wide in its application to any business which the company may carry on during twenty-five years, still the covenant may be and is valid as regards the gun and ammunition business. (2) The covenant thus restricted, although unlimited as to space, and in that sense and to that extent general, is nevertheless not contrary to public policy, and, therefore, not contrary to the rule which forbids general as distinguished from partial restraints. In the first place, the covenant is part of a transaction for securing to an English company the inventions and business of a foreigner. The transaction, and the covenant as part of it, encourage rather than restrict trade in this country. In the next place, the business to which the covenant relates is very peculiar, owing to the small number and character of possible customers. Then, again, the assignments of the patents and their connection with the covenant prevent the covenant, for some years at all events, from having any tendency to produce a monopoly not already produced by the patents, and also prevent the covenant from imposing any undue restriction on the liberty of the defendant to carry on the business to which the covenant, as restricted, relates; and I can see no reason for holding that the possible duration of the covenant beyond

the expiration of the patents invalidates the covenant. Further, our predecessors, from whom we inherit this branch of the law, would never have thought it contrary to public policy to prevent a man from assisting foreigners to compete with an English trader who had bought his business, and I am not aware that it has ever been judicially held to be contrary to public policy to give effect to a covenant entered into for such a purpose. Lastly, the covenantor is at liberty to carry on the specified business on behalf of the company, and is also at liberty to carry on for his own benefit the other business reserved to himself, and to which he prefers to devote his attention. (8) Apart from public policy, the covenant in question is reasonable as restricted. So restricted, it is not wider than is reasonably necessary for the protection of the interests of the covenantee." Pp. 650, 651. Justice BOWEN rendered a very elaborate opinion, in which he reviewed the history of the law in regard to restraints of trade, and came to the conclusion that the old rule as to general restraints of trade still obtained, but that a restraint was not general, within the meaning of the rule, if it was limited in space, or if it still permitted the trade to be carried on within the kingdom in some manner or with some persons; if thus limited it was a partial instrument only and was valid, if reasonable, and not against public policy; that the covenant in question, though unlimited in space, was partial, since the business restricted might still be pursued by the covenantee on behalf of the plaintiff company, and that, as thus restricted, it was reasonable as between the parties and not injurious to the public. Justice SMITH agreed substantially with Justice BOWEN. After referring to cases in which the restraint was partial though unlimited in space, he says: "These cases show that a covenant in partial restraint of trade, whether as to the person with whom the covenantor is to trade, or as to the business which he is prohibited from carrying on, may be good, although unlimited as to space. In my judgment there is no such hard and fast rule as is contended for, viz., that every covenant in restraint of trade is ipso facto void if it is unlimited as to space. On the contrary, in my judgment a covenant which is but a partial restraint of trade will be good, though unlimited as to space, if, in the circumstances of the particular case to which it is applied, the covenant is reasonable and not to the detriment of the public."

The decision of the Court of Appeals was unanimously affirmed in the House of Lords, (1894) App. Cas. 535, and the last remnant of the arbitrary distinction between general and partial restraints was swept away. Lord HERSCHELL says: "Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which, I think, was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law." P. 548. Lord ASHBOURNE expresses the view that "the inquiry as to the validity of all covenants in restraint of trade must * * *

ultimately turn upon whether they are reasonable and whether they exceed what is necessary for the fair protection of the covenantee." P. 558. Lord MACNAGHTEN says: "In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and, therefore, void. *Colgate v. Bacher*, Cro. Eliz. 872. In time, however, it was found that a rule so rigid and far reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognized that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases." P. 564. "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and, therefore, void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of the particular case. It is a sufficient justification, and, indeed, it is the only justification if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable with reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities." P. 565.

And Lord MORRIS, after referring to the authorities, and expressing the opinion that the weight of authority up to the present time is that all general restraints are void, proceeds to say: "It appears, however, to me that the time for a new departure has arisen, and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading." P. 575.

5. Modern doctrines — tendency to ignore the distinction between general and partial restraints — American cases.— The early cases in this country assume as unquestionable that a restraint extending to the entire state is void, irrespective of any question as to whether it is necessary for the fair protection of the covenantee, in respect to the subject-matter of the contract. *Chappel v. Brockway*, 21 Wend. 157 (1839); *Alger v. Thacher*, 19 Pick. 51 (1837), and cases cited in section 3. The same is true of many cases decided since the case of *Whittaker v. Howe*, 3 Beav. 383 (1841). See *Lange v. Werke*, 2 Ohio St. 519 (1853); *Thomas v. Admr. of Miles*, 3 Ohio St. 274 (1854); *Dunlop v. Gregory*, 10 N. Y. 241 (1851); *Lawrence v. Kidder*, 10 Barb. 641 (1851); *Keeler v. Taylor*, 53 Penn. St. 467 (1866); *Wright v. Ryder*, 86 Cal.

342 (1868); *More v. Bonnet*, 40 Cal. 251 (1870); *Callahan v. Donnelly*, 45 Cal. 152 (1872); *Cook v. Johnson*, 47 Conn. 175 (1879); *West Va. Trans. Co. v. Ohio Riv. Pipe Line Co.*, 22 W. Va. 600 (1883); *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 6 South. Rep. 41 (1889); *State v. Nebraska Distilling Co.*, (Neb.) 1 Am. R. R. & Corp. Rep. 604 (1890).

In *Taylor v. Blanchard*, 13 Allen, 370 (1866), the plaintiff took the defendant as a partner in the business of manufacturing and selling shoe-cutters, of which business the defendant was ignorant, and the defendant covenanted that after the termination of the partnership he would not "set up, exercise or carry on the trade or business of manufacturing shoe-cutters within the commonwealth of Massachusetts." There was nothing to show that the business was coextensive with the state, and the court held the covenant to be unreasonable and void. In reference to the old rule, that restraints extending to the whole state are void, it is said: "Whether the principle extends to a case where, by means of traveling agents, one has extended his business through a large part of the country, or a large part of the state, and sells the good will of the business with a restriction merely coextensive with that good will, and not extending beyond the actual sphere of the business of the vendor, we need not discuss. The law regards the good will of a particular trade as property having a market value, and protects it to a reasonable extent, depending somewhat upon the nature and character of the business." This plainly implies that in the case supposed a restraint extending to the entire state would be valid. In *Morse Twist Drill & Machine Co. v. Morse*, 108 Mass. 73 (1869), the defendant sold to the plaintiff certain patents and machinery for making twist drills and collets, agreed to transfer to it all improvements, inventions and arrangements relating to the patents or business that he might make or invent, and to use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure success. He also agreed to do no act that might injure the company or its business, and that he would at no time aid, assist or encourage in any manner any competition with the same. Defendant induced the formation of the plaintiff company, became a large stockholder and agreed to serve it in the capacity of superintendent for three years. After the expiration of the three years he was employed for another year, during which he resigned his position, sold his stock in the company, and set up the manufacture of other twist drills and collets, which he sold in competition with the plaintiff and to its old customers. The court held the contract valid, and say: "The language of the contract implies that, when the plaintiffs joined the defendant in the new business, they had confidence in his mechanical skill and ingenuity, and intended to avail themselves of it for the benefit of the business in which he induced them to embark; and that it was a material part of the consideration for which they paid him so considerable a sum and invested their capital. It was not in restraint of trade, nor contrary to public policy, that the defendant should contract to render to the plaintiffs his exclusive services in this respect. This part of the contract he is alleged to have violated. And although the defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the

formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." The English cases were reviewed, and the conclusion reached that there are cases in which a restraint extending to the entire state will be valid. In the recent case of *Gamewell Fire Alarm Tel. Co. v. Crane*, (Mass., 1893), ante, p. 78, a restraint, very similar to the one passed upon in the preceding case, and made under very similar circumstances, was held void as an unreasonable restraint of trade. The cases holding restraints void when not limited as to space are cited, and in conclusion the court says: "We are of the opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times declared by this court, we think it is for the legislature to make it." By the law, "as many times declared" by the court, is evidently meant the rule that restraints not limited as to space are void, and the court apparently wishes it understood that this rule is definitely established until changed by the legislature. In *Bishop v. Palmer*, 146 Mass. 469 (1888), a covenant by the vendor on the sale of a business, not to engage in the same business for five years, was held void as a general restraint of trade. But there was nothing to show that so great a restraint was necessary for the fair protection of the vendee.

In 1868, and again in 1872, the Supreme Court of California held that a restraint extending to the entire state was void, solely on the ground that it was unlimited in space. *Wright v. Ryder*, 86 Cal. 342 (1868); *Callahan v. Donnelly*, 45 Cal. 152 (1872). In the former of these cases the California Steam Navigation Company, engaged in navigating the waters and rivers of California, sold one of its boats to the Oregon Steam Navigation Company, an Oregon corporation organized to navigate the Columbian river and its tributaries and the Pacific ocean, and the latter covenanted that the boat should not be run "upon any of the routes of travel on the rivers, bays or waters of the state of California" for a period of ten years. The boat was several times sold with like covenants by the successive vendees, and was finally sold to the defendant without any such covenant. The defendant, being ignorant of the prior covenants, purchased the boat to operate in California, and when he learned of the covenants refused to complete the purchase. The suit was for the purchase price, and was tried upon the theory that if the covenants were valid the defendant was not obliged to complete the purchase, otherwise he was. The court held the covenant void and laid down the general rule that a restraint extending to the entire state was void, though on a good consideration and reasonable as between the parties.

The same covenants were before the Supreme Court of the territory of Washington, and were held invalid upon substantially the same grounds as in the California cases. *Oregon Steam Nav. Co. v. Hale*, 1 Wash. Ter. 283 (1870).

In the other California case the defendant, being associated with the plaintiff in the business of manufacturing and selling Donnelly's yeast powder, sold his interest in the business to the plaintiff, and agreed not to make or sell any yeast powder under the name or in the nature of Donnelly's yeast powder within the state of California. The business would appear to have been one extend-

ing over the state. The covenant was held void because not limited in space. The court says: "A contract in restraint of trade must designate the space within which it is to operate, and must not be unreasonably extended. Such contracts, when upheld, are only in cases where the parties have restricted the territory in which they are to operate, and where the court, in considering the nature of the business in connection with the territorial limits assigned, is of opinion that the designated limits are not unreasonable in extent."

Since these cases were decided it has been provided by section 1678 of the Civil Code that "every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided in the next two sections, is to that extent void." The next two sections merely provide that one who sells the good will of a business may agree not to carry on a similar business within a specified county or city; and that, in anticipation of a dissolution of a partnership, a partner may agree not to carry on a similar business within the city or town where the partnership business is transacted. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Pac. Rep. 589 (1892).

In *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64 (1873), a covenant the same as that held void in *Wright v. Ryder*, 36 Cal. 342, and pertaining to the same vessel, was held valid by the Supreme Court of the United States, Justices CLIFFORD, SWAYNE and DAVIS dissenting, but filing no opinion. It was held that the question whether a covenant is too extended or not is not to be determined by a reference to state lines. "This country is substantially one country," says the court, "especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state."

In *Beal v. Chase*, 31 Mich. 489, decided in 1875, it appeared that the defendant had built up a large and prosperous printing and publishing business at Ann Arbor, under the name of "Dr. Chase's Steam Printing House." A part of the business consisted in publishing a newspaper and a receipt book, both of which sold throughout the state. Defendant sold the business to the plaintiff and covenanted that he would not engage, directly or indirectly, in the business of printing or publishing in the state of Michigan so long as the plaintiff carried on the business at Ann Arbor. On a bill to enjoin the defendant from a violation of the covenant, it was held to be valid. The court says: "Concerning the validity of the agreement, we concur in regarding it as not unreasonable in fact, and as based on full consideration. One of us has doubted whether it could properly include the whole state; but considering the rule to the contrary as somewhat artificial, he concurs in maintaining the agreement." P. 495. When this case was originally heard Judge CHRISTIANCY was a member of the court, and he prepared an elaborate opinion in the case, but before it was finally decided he had ceased to be a member of the court. This opinion has been printed with the report of the case, and as it contains a very admirable piece of reasoning, we quote from it somewhat at length as follows: Referring to *Mitchell v. Reynolds*, 1 P. Wms. 181, he says: "This case is the foundation of the rule relied upon, and the dictum of the learned judge most unequivocally shows that the reason for his opinion that a

restraint, coextensive with the kingdom, would be void, was the impossibility that one man could have an interest in a restraint so broad upon the trade of another. This decision was made more than a century and a half ago, and for a condition of things and a state of society wholly different from those which now prevail. It may have been quite true at that time, that to a person following any particular trade, profession or occupation in London, it would be wholly immaterial whether any person was or was not following the same trade, profession or occupation in Newcastle, since the little business intercourse and the difficulty and delay of communication would wholly preclude anything like competition between two persons in the same occupation thus circumstanced. But it cannot be said that the same fact is true any longer in England, or that it could be true of the state of Michigan to-day. In some occupations it is well known that rivalry and competition are active between professional men, artisans and merchants, located at extreme points, and that in some cases this competition may be quite as severe and effective at a distant point as in the same locality where another is located. Indeed, in some cases where a single house is competent to supply all the demands of a state in its line, or where one manufactory would be fully equal to all its wants, the one establishment would not only have an interest in keeping out any other, but it would be interested to the whole value of its business, which the competition might render utterly worthless. If, therefore, we look only to the interests of the parties contracting, there would seem to be nothing in the reasons assigned by Chief Justice PARKER which would necessarily preclude a contract as broad as the one here disputed, provided the proper interest appeared to support it.

“It is said, however, that the public is a third party in such cases, and that the public is concerned to prevent such contracts, because: (1) They tend to prevent competition, which the public interest favors; and (2) they deprive the state of the services of a citizen by binding him to idleness or emigration.

“As to the first ground, it may be said it is quite true the public are interested in competition in business; but this is not true under all circumstances, nor to every extent. The public is quite as much interested in the prosperity of its citizens in their various avocations as it can possibly be in their competition. The latter may bring low prices to purchasers, but may also bring them so low that capital becomes unprofitable and business men fail, to the general injury of the community. If only one publishing house of large capital could be prosperous in the county of Washtenaw, the people of the county can have no interest in the investment of large capital in a second, and the sharper the competition the more unfortunate for the people, if ruin to the parties concerned must result. The illustration holds good for the state when the particular business competed with is of state interest and importance, for no community can be benefited by the competition of its members when it is carried beyond the bounds of a reasonable prosperity to the parties engaged in it. This is fully recognized by Chief Justice PARKER in *Mitchell v. Reynolds*, who assigns as one reason which may support contracts in restraint of trade, ‘that there may happen instances wherein they may be useful and beneficial, *as to prevent a town from being overstocked with any particular trade*; or, in case of an old man, who, finding himself under such circumstances,

either of body or mind, or that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom he may procure to himself a livelihood which he might probably have lost by trading longer.' P. 191. If, then, their tendency to preclude competition may be a reason for denying validity to such contracts in some cases their preventing it seems to have been found a sufficient reason for upholding them in others, so that competition seems not to be regarded as necessarily in itself beneficial, but as something which may or may not be beneficial, according to the circumstances. And it may well be asked, who in general are the best judges of these circumstances, the parties concerned, who have an interest in making them the subject of their contracts, or the courts, who can obtain of the circumstances only such partial and unsatisfactory views as conflicting and imperfect evidence can give them?

"As to the second ground, it must be conceded that the state has always an interest that none of its citizens shall be kept in enforced idleness. But when a contract only binds a person not to engage in a particular business within the state, is this consequence a necessary or even a probable one? It certainly might have been so in England in the days of Chief Justice PARKER, when a system of apprenticeship prevailed which rendered it exceedingly difficult for one to obtain a living by his industry in any other vocation than that for which he had fitted himself by serving his time under its rules and under the law, but in this country at this time — where a change of occupation is too common to excite remark, where merchants become manufacturers, and lawyers farmers, and farmers traders, not because they receive a consideration for doing so, but because with larger opportunities for observation than they had at first, they have fully satisfied themselves that such changes will be for their advantage, as oftentimes they prove to be — any rule of law which should assume that one who for a consideration bargains not to follow his previous business had thereby bound himself to idleness and penury, to the detriment of the state, would be a rule absurd in itself and contrary to general experience and observation. On the contrary, where such a contract is the result of fair bargaining, the reasonable presumption is that each party, in view of all the circumstances which were within his own intimate knowledge, was able to see how the bargain was to result to his advantage, and that the party resigning the business did not do so without being satisfied that he was receiving full equivalent, which would be more advantageous to him than the property and the business sold. And where a man has fully decided to sell his business to take up another, can there be any reason of state policy why he should be precluded from bargaining for the additional consideration he can obtain by agreeing not to engage in the same business? If a man can sell his business for ten thousand dollars only, but the purchaser will give twice as much in case the seller will agree not to engage in a ruinous competition with him, what interest has the public in denying to the seller this additional sum, or in releasing him from his bargain, if, after he has received it, he shall coolly repudiate this portion of his contract, while he keeps the consideration he has received for it? If there be any sufficient reason, it was not presented on the argument, and it is not hinted at in any of the cases to which our attention has been directed.

"And it certainly can be no sufficient objection to such a contract that it may possibly result in one party going beyond the state limits to engage in the same business anew. What if it shall do so? Are our interests as a state so petty or exclusive and our policy so narrow and invidious that we frame rules to keep people within the state contrary to their inclination, or when it would be for their interests to go elsewhere? Yet this narrow, illiberal and exclusive policy must certainly be relied upon if the tendency of a contract to induce a contracting party to leave the state is to be relied upon. If such a position is sound, then a contract made in this state for the services of a citizen in Chicago, or any other point outside the state, should be treated as void here, because depriving the state of the benefit which might flow from the industry of one of its citizens. Or to take a case still more exactly parallel: Partners in trade at Superior City might divide their stock, and one, for a consideration, agree that he would remove his share across the river to Duluth, and not again engage in the business at Superior City; but this agreement, though perfectly reasonable, considered with reference to the individuals only, would on this doctrine be void, because a state policy which has come down to us from semi-civilized or less-enlightened times, when governments were accustomed to prohibit citizens from leaving the realm, and gold and silver from being exported, is supposed to be violated by a transfer of the industry and capital of a citizen across a river into another state. The position seems to us to require no further attention."

In *Caswell v. Gibbs*, 38 Mich. 331 (1876), a covenant of the defendant never to tow boats in competition with the plaintiff, appears to have been deemed invalid as in general restraint of trade, but the real ground of the decision of the case was that the covenant was too uncertain and indefinite to be enforced. No reference was made to the case just cited, and it is not a very satisfactory case from any point of view. The case of *Western Wooden Ware Assn. v. Starkey*, 84 Mich. 76; 47 N. W. Rep. 604 (1890), may be referred to here for comparison. The case is not particularly in point here and will be considered in a subsequent note.

In *Peltz v. Eichele*, 62 Mo. 171 (1876), defendant was a manufacturer and dealer in matches in St. Louis and sold his business to the plaintiffs, covenanting that he would not enter into the manufacture of matches at this or any other place for the term of five years. Defendant violated the covenant by setting up the same business in St. Louis. The court held the covenant divisible and, of course, held it good as to St. Louis. But it was intimated that the entire covenant might be valid, the court saying: "Contracts of this character are not now regarded by the courts with so zealous an eye as formerly, and it is not at all apparent that any of the mischievous consequences sought to be prevented by the adoption of the early rule on this subject would ensue if the entire contract in this case were held to be valid."

In *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442 (1882), S. & B. owned all the stock of the plaintiff company, which made and sold a stylographic pen and also owned the patents under which the pen was manufactured. They sold both stock and patents to T., C. & C., and agreed not to engage in the same business in opposition to the company, so long as T., C. & C. should be its trustees. The covenant, though unlimited both as to time

and space, was held to be valid. In the leading case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, decided in 1897, the facts were as follows: The defendant made and sold matches, having a factory located in the city of New York, and his business extended through the United States generally. He sold out to a Connecticut corporation and agreed that, for ninety-nine years, he would not, directly or indirectly, engage in the manufacture or sale of friction matches, except as agent of the vendee, within any part of the United States, except Nevada and Montana. The vendee sold the business and assigned the contract to the plaintiff. The defendant became an employee and stockholder of the defendant, but afterwards left its employ and became superintendent of a rival New Jersey company, which had a factory in New Jersey, and opened a store in New York for the sale of matches, other than those made by the plaintiff. On a bill to enjoin, the covenant in question was held valid. The court, while inclining to the view that a covenant in general restraint of trade is valid, if it is only coextensive with the interests to be protected, took the position that the covenant was partial, though it excluded the whole of the state, because it did not exclude the whole of the United States, and that, being partial and reasonable, it was valid. The court says: "In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed." And, on the subject of the validity of general restraints, it is said: "Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and, to a great extent, business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire, for the same or similar purposes, to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. * * * When the restraint is general, but, at the same time, is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade that a man shall be allowed to sell the good will of the business and the fruits of his industry on the best terms he can obtain. If this business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permit-

ted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment, and for the exercise of useful talents, so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract within the law, and require that business transactions should not be trammelled by unnecessary restrictions." Pp. 481, 482. In the later case of *Tode v. Gross*, 127 N. Y. 480, 485; 28 N. E. Rep. 469 (1891), the same court, in speaking of such agreements, says: "Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory." The case itself involved the sale of a trade secret. On a sale of a trade mark and of stock in a company engaged in manufacturing and selling thermometers and storm glasses, defendants covenanted "not to engage in the manufacture of any thermometers of any kind or description, nor of any storm glasses, at any place within the United States, at any time within a period of ten years from the date hereof." On a bill to enjoin the violation of the covenant it was alleged that the business was one which required for its full and proper development the whole territory of the United States. A demurrer to the bill was overruled and the covenant held valid, the court saying: "The cases cited seem to sustain the doctrine that a restriction which is no greater than the interest of the vendee requires, and by giving which the vendor has obtained an increased price for what he sold, is valid, though extended throughout the whole kingdom or country. In this case the defendants, by their demurrer, admit that the business of the plaintiff in the manufacture and sale of thermometers and storm glasses required for its full and proper development the entire territory embraced within the United States, and that one of the considerations that induced the plaintiff to make such purchase and pay the consideration named was such restriction which would enable it to develop its business throughout the United States, without interference on the part of the defendant. Assuming this, as we must, and it seems quite clear that the restraint, though general, is at the same time coextensive only with the interest to be protected, and with the benefit meant to be conferred by this agreement; that it imposes no restriction upon the defendants which is not beneficial to the plaintiff, or which was unnecessary for its reasonable protection, and that it was induced by a consideration which made it reasonable for the parties to enter into it." *Watertown Thermometer Co. v. Pool*, 51 Hun, 157 (1889). In *Underwood v. Smith*, 19 N. Y. Supp. 380 (1892), the defendant sold to the plaintiff his typewriting supply business, with machinery, tools, receipts, formulae, etc., and agreed that for fifteen years he would not, either in his own name or otherwise, directly or indirectly, engage in or aid, or instigate others to enter upon, or be interested in, any business of like nature. The covenant was held valid.

In *Berlin Machine Works v. Perry*, 71 Wis. 495 (1888), the defendant was the inventor and patentee of sand papering machines, and he and M. were partners in the business of making and selling the same, and it may be inferred

from the case that their business extended throughout the United States. Defendant sold and transferred his interest in the business and patents to M., and covenanted that he would "not thereafter manufacture, sell or cause to be sold any sand papering machines of any description," without M.'s consent. The business afterwards became vested in the plaintiff corporation. The defendant invented and patented a new machine, which did not infringe the former patents, but which was designed to accomplish the same work. These machines were being made and sold under the defendant's patent, in competition with the plaintiff. On a bill to enjoin the defendant, it was held that the covenant was too large in two respects: First, because it was world-wide, while the business sold extended only to the United States, and, second, because it restrained the defendant from making and selling, or causing to be made and sold, sand papering machines of *any description*, and not merely such as would compete with the plaintiff's machines. The covenant was held void, not because it was general, but because it was greater in respect to territory and in respect to trades or businesses restrained, than was necessary for the protection of the vendee, and was, therefore, unreasonable. The decision clearly goes on the ground that reasonableness is the test of validity, and that a restraint extending to the state or the United States would be valid, if reasonably necessary for the protection of the covenantee. The principal case, also by the Wisconsin court, is to the same effect.

The old rule was reiterated in *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 6 South. Rep. 41 (1889). The covenant passed upon was unlimited in form, being an agreement "not to handle any more plow stocks or plow blades." But the court construed this to mean, in view of the circumstances surrounding the parties, that the covenantor would not "handle any more plow stocks or plow blades" in the territory in which the parties had previously been dealing. As thus construed the restraint was limited to a definite part of the state and no restraint extending to the entire state was involved and what was said on that point was dictum.

A contract between a manufacturing corporation whose business extended throughout the United States and Canada, and one of its traveling salesmen, that the latter should not enter the service of any competitor for three years after leaving the plaintiff's employ, was sustained by *BLODGETT, J.*, in *Carter v. Alling*, 43 Fed. Rep. 208 (1890).

In *Herreshoff v. Boutineau*, 17 R. I. 8; 19 Atl. Rep. 712 (1890), the plaintiff hired the defendant to teach French in his school in Providence for six months and, in consideration of his employment, took from him an agreement that for a year after the end of his service he should not teach either French or German anywhere in the state of Rhode Island. After the expiration of the six months the defendant continued to teach French in Providence and the plaintiff sued to enjoin him from so doing. The court held that the agreement was not void merely because the restraint extended to the entire state, but held it to be unreasonable because the restraint was greater than the reasonable protection of the plaintiff required. Upon the former point the court says: "In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started

in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would, therefore, be absurd, in the light of this common experience now, to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees for a sufficient consideration, not to follow some one calling within the limits of a particular state. There is no expatriation in moving from one state to another, and from such removals a state would be likely to gain as many as it would lose. We do not think that public policy demands an agreement of the kind in question to be declared void, and we do not think that such a rule is established upon authority. We, therefore, hold that the agreement set out in the bill is not void simply because it runs throughout the state." Similar views are expressed and the same conclusions upheld by the same court in the recent case of *Oakdale Mfg. Co. v. Garst*, post.

In *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272; 47 N. W. Rep. 806 (1891), the facts were as follows: The plaintiff, an Illinois corporation, and the defendant, a Wisconsin corporation, were each engaged in the business of issuing and selling benefit certificates, which entitled the holders to maintenance and medical and surgical treatment when sick or injured, and of providing hospitals and places for the reception of such holders. Both corporations did business throughout Minnesota, Wisconsin, the northern peninsula of Michigan and other states. They made an agreement to continue for three years by which the plaintiff company was to have the exclusive right of selling such certificates to railroad employees in Minnesota, Wisconsin and the northern peninsula of Michigan and the defendant company was to have the exclusive right of selling the same to all other persons within the same territory. The plaintiff also agreed to secure to the defendant, as far as possible, the benefit of the former's contracts and arrangements with hospitals in the described territory, and the defendant was to pay the plaintiff certain sums of money. The court held the restraint to be reasonable and valid, and, after referring to the earliest English doctrine and the reasons therefor, says: "No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will. Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place. And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common-law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions, both English and American."

B. CONCLUSIONS—RULE AS TO GENERAL AND PARTIAL RESTRAINTS.

6. Restraints of trade not void merely because the restraint is unlimited in space or coextensive with the territory of the state or nation.—It seems to us that the rule that restraints of trade extending over the state or kingdom are void because unlimited in space, never had any foundation either in reason or authority. The starting point of the rule is to be found in the dicta of Chief Justice PARKER in *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Smith's Lead. Cas. *508 (1711). In the condition of business and civilization at that time in England it was simply inconceivable that a restraint extending over all England ever could be reasonable. This was the foundation of the judge's view upon this point, as appears from several passages in the opinion. The third reason assigned by him why restraints of trade are invalid is as follows: "Because, in a great many instances, *they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does in Newcastle?* and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." And in stating the reason why a contract not to trade in any part of England is void he says: "Because it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime." And again, in speaking of such restraints, he says that they are of "no benefit to either party, and only oppressive." The sum and substance of all these reasons is that a contract not to trade in any part of England was deemed to be void because it could be of no use or benefit to the obligee. Some idea of the slowness and difficulty of communication in England in the days of Chief Justice PARKER, and of the isolation of different parts, may be gathered from the authorities referred to in note to *Rafferty v. Central Traction Co.*, 6 Am. R. R. & Corp. Rep. 287, 303, 304. When the facts in this regard are understood it will be very plain that it did not then matter to a tradesman in London what another did in Newcastle. But it is plainly to be gathered from the reasoning and decision of the learned judge that if a contract not to trade in any part of England could be of use and benefit to the obligee it would be valid, unless the purpose or effect was to secure or create a monopoly in some trade or business.

In the *Maxim-Nordenfeldt* case, (1894) App. Cas. 535, Lord WATSON, referring to what he considers the dicta of judges concerning general and partial restraints, says: "They never imagined that any business could attain such wide dimensions, that it could not be reasonably protected from the invasion of the seller except by subjecting him to a restraint unlimited in space. I am under the impression that, had they conceived the possibility of such a case occurring, the rule would have been expressed in somewhat different terms. I think that, as stated, it was meant to involve the assumption that there could be no such case." P. 553. And, in the same case, Lord HERSCHELL expresses the view that, if PARKER, Ch. J. had lived under present conditions, he would never have laid down any hard and fast rule as to general and partial restraints.

Although the dictum of Chief Justice PARKER in regard to general restraints of trade has been often reiterated and has been adopted and promulgated by text writers as one of the fundamental principles of the law of contracts, there

is not a single case in the English reports, so far as we have been able to discover, in which the promulgation of this rule was necessary to the decision of the case. There are cases in which restraints have been held void because they extended throughout the kingdom, but in all these cases it will be found that the restraint was also unreasonable because unnecessary for the fair protection of the obligee. If there was any case in the English reports in which a restraint, otherwise reasonable as between the parties, was held void simply because it was unlimited in space, it is safe to assume that it would have been brought to light in some one of the recent cases in which the question has been so much fought over. But no such case has been referred to. In the last case on contracts in restraint of trade, and in the most learned and exhaustive opinion that has probably been delivered on the subject, that of BOWEN, L. J., in the *Maxim-Nordenfeldt* case, (1893) 1 Ch. 680, the learned judge relies upon the following cases in support of the rule that general restraints are void: *Mitchell v. Reynolds*, 1 P. Wms. 181 (1711); *Chesman v. Nainby*, 2 Ld. Raym. 1456 (1726); *Clerke v. Comer*, Cas. t. Hardw. 53 (1734); *Homer v. Ashford*, 3 Bing. 322 (1825); *Warde v. Byrne*, 5 M. & W. 548 (1839); *Hinde v. Gray*, 1 Scott N. R. 123 (1840); *Proctor v. Sargent*, 2 M. & W. 33 (1840); *Tallis v. Tallis*, 1 E. & B. 391, 411 (1853). It may fairly be assumed that these are the strongest cases to be found. But in none of them did the court pass upon a contract in general restraint of trade except in *Warde v. Byrne*, 5 M. & W. 548. What was said about general restraints of trade in all the other cases was simply dictum. In *Ward v. Byrne* the plaintiff, a coal merchant in London, doing only a local business, took the defendant as a clerk, and the latter gave a bond that he would not follow or be engaged in the business of a coal merchant for nine months after leaving the plaintiff's service. There was no limit as to space, and the court held it to be void. It is manifest that the restraint was unreasonable in extent and void for that reason. The judges placed their decision both upon the ground that the restraint was general and that it was unreasonable. In the *Maxim-Nordenfeldt* case, (1894) App. Cas. 557, Lord ASHBOURNE says: "I do not know that there is a single reported case, whose facts are clearly known, where a covenant in general restraint of trade, clearly reasonable in itself and only affording a fair protection to the parties, has been held to be void." And this is quite satisfactorily demonstrated in the same case by Lord MACNAGHTEN.

While the old rule as to the invalidity of contracts in general restraint of trade has been abundantly recognized in the American cases, there are but three or four in which restraints, extending to an entire state and reasonable as between the parties, were held void because unlimited in space. They are: *Wright v. Ryder*, 36 Cal. 342; *Callahan v. Donnelly*, 45 Cal. 152; *Oregon Steam Nav. Co. v. Hale*, 1 Wash. Ter. 283; *Gamewell Fire Alarm Tel. Co. v. Crane*, ante, p. 78. These cases have already been sufficiently referred to in the last section. In the California and Washington cases the courts seem to have considered that there was an absolute and binding rule forbidding covenants in general restraint of trade. In the Massachusetts case, while the general effect of the case is to re-establish the old rule, the decision is put also on the ground of unreasonableness. It is said of the agreement in question: "The stipulation seems to us to be something more than is reasonably necessary to

protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion." All these cases were decided long after the rule had been impugned in England. There are, of course, other cases in which restraints unlimited in space were held void, but they are cases in which the restraint was also unreasonable and void on that ground alone.

If we turn now to the reason of the matter, there is as little to be found in this field in support of the rule in question as in that of precedent. For nearly three hundred years it has been held that restraints which were reasonable and not injurious to the public were valid and enforceable. And restraints have been held to be reasonable and not injurious to the public when they were not greater than was necessary for the fair protection of the covenantee in respect to the subject-matter of the contract, and not injurious to trade in general. Starting with restraints limited to a single parish, as in *Mitchell v. Reynolds*, 1 P. Wms. 181 (1711), or to a territory within half a mile of a given point, as in *Chesman v. Nainby*, 2 Ld. Raym. 1456 (1726), the area of valid restraints was continually enlarged as the conditions of trade and business changed, until restraints covering half or three-fourths of the state, or even more, were sustained as valid, and always for the reason that the restraint was no greater than was necessary for the fair protection of the covenantee in respect of the principal matter of the contract. Now, if a restraint extending to half or three-fourths of the state is to be sustained because no more than is necessary for the fair protection of the covenantee, upon what rational principle is one extending to the whole of the state to be held void when that is no greater than the fair protection of the covenantee requires? It seems to us that there is but one answer to this question, and that any arbitrary rule as to space is as destitute of reason as it is of authority. Upon this question the remarks of Mr. Justice FRY in *Rousillon v. Rousillon*, 14 Ch. Div. 351, are very much in point. He says: "But, then, it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and, therefore, extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which, by their very nature, are extensive and widely diffused. There are others which, from their nature and necessities, are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule, if it existed, would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable, and also where it was reasonable. Now, in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the universality of the prohibition was reasonable, that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority. In the next place the rule is pressed upon me as an

artificial rule, or, as it was called by the later Vice-Chancellor WICKENS, a hard and fast rule. Such a rule might always be evaded by a single exception. No exception can be said to be colorable to a rule of this description, because you can only judge whether an exception be colorable or not by the principle of the rule, and if the rule be really an artificial one without principle, there is no criterion for saying whether the evasion is colorable or not. It appears to me, for these reasons, that I ought not to hold such a rule to exist unless it be clearly established." Pp. 366, 367. And, after referring to various cases, he continues: "I have, therefore, upon the authorities, to choose between two sets of cases, those which recognize and those which refuse to recognize this supposed rule, and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable." P. 369.

The cases in support of these views, which have been noticed at length in the last two sections, are here recapitulated for convenience: *Whittaker v. Howe*, 3 Beav. 388 (1841); *Mallan v. May*, 11 M. & W. 652 (1843); *Tallis v. Tallis*, 1 El. & Bl. 391; 72 E. C. L. R. 390 (1853); *Harms v. Parsons*, 82 Beav. 328 (1863); *Ainsworth v. Bentley*, 14 Weekly Rep. 630 (1866); *Ingram v. Stiff*, 5 Jur. (N. S.) 947 (1859); *Leather Cloth Co. v. Lorsont*, L. R., 9 Eq. Cas. 345 (1869); *Rousillon v. Rousillon*, 14 Ch. Div. 851 (1880); *Davis v. Davis*, 36 Ch. Div. 359 (1887); *Badesche Anilin & Soda Fabrik v. Schott*, (1892) 3 Ch. 447; *Moenich v. Fenestre*, 61 L. J. Ch. 737 (1892); *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630; (1894) App. Cas. 535; *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73 (1869); *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64 (1873); *Beal v. Chase*, 31 Mich. 489 (1875); *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442 (1882); *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (1887); *Watertown Thermometer Co. v. Pool*, 51 Hun. 157 (1889); *Underwood v. Smith*, 19 N. Y. Supp. 380 (1892); *Berlin Machine Works v. Perry*, 71 Wis. 495 (1888); *Richards v. American Desk & Seating Co.* (principal case); *Carter v. Alling*, 43 Fed. Rep. 208 (1890); *Herreshoff v. Boutineau*, 17 R. I. 3; 19 Atl. Rep. 712 (1890); *National Benefit Co. v. Union Hospital Co.*, 47 Minn. 272; 47 N. W. Rep. 806 (1891); *Oakdale Mfg. Co. v. Garst*, post (1894). The opposing cases, other than those containing dicta, have already been given in this section.

In *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (1887), it was held that in this country, whether a restraint is general as regards space, is not to be determined by state lines, and a covenant, made in New York and in connection with the sale of a business located in New York, and extending to the whole United States except Nevada and Montana, was held to be partial and not general, within the old rule handed down from the case of *Mitchell v. Reynolds*. To the contention of the defendant that the covenant was one in general restraint of trade because it applied to the whole state, the court said: "We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and

allegiance are due both to the state and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial." A similar view is intimated in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 67. But in neither of these cases was the validity of a covenant extending throughout the United States involved. Had the covenant in question in the New York case embraced the national domain, the reasoning of the court tends to the conclusion that it would have been sustained. Such covenants were sustained in the following cases: *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 78 (1869); *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442 (1882); *Watertown Thermometer Co. v. Pool*, 51 Hun, 157 (1889); *Carter v. Alling*, 43 Fed. Rep. 208 (1890); *Underwood v. Smith*, 19 N. Y. Supp. 380 (1892); *Oakdale Mfg. Co. v. Garst* (1894), post. In *Taylor v. Blanchard*, 13 Allen, 370, 374, it is said by the court: "The plaintiff further contends that in this country a restraint ought not to be held void unless it extends throughout the United States, because they are one country in respect to trade and business, and the power to grant patents and copyrights and to regulate trade is vested in the United States government. But we cannot regard this view as just. A monopoly extending throughout the state may be as really injurious to the people of the state as if it extended throughout the whole country."

7. Further as to general and partial restraints—restraints unlimited in space but limited as to the persons with whom or modes in which the business may be carried on—no hard and fast rule in the matter.—Contracts in general restraint of trade have usually been understood to be those which were unlimited in space, and this is especially so in this country. In *Mitchell v. Reynolds*, 1 P. Wms. 181, PARKER, Ch. J., says that "voluntary restraints by agreement of the parties are either, first, general, or, second, particular, as to persons or places." Many cases have held that restraints unlimited in space were valid, because they left the covenantor free to carry on the business in question with certain persons or in a certain manner. These cases will be referred to below. The whole subject was carefully gone over by BOWEN, L. J., in the *Maxim-Nordenfeldt* case, (1893) 1 Ch. 630, who says: "It has been, in my opinion, the doctrine of the courts of common law, ever since the reign of Queen Elizabeth, that contracts in general restraint of trade are void as being contrary to public policy. Contracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. * * * Distinguished from these general restraints, which the English law discountenances, are partial or limited restraints, or, as they are sometimes termed, particular restraints, which, upon certain conditions, the English law permits and enforces. An agreement in 'particular' or 'partial' restraint of trade may be defined as one

in which the area of restriction is not absolute, but in which the covenantor retains for himself the right still to carry on his trade either in some place, or for the benefit of some persons, or in some limited and prescribed manner. Particular restraints, according to the language employed in *Mitchell v. Reynolds*, 1 P. Wms. 181, are those in which there is some limitation in respect of places or persons short of an absolute or total restriction. But there is also a third kind of limitation which the law will sanction under reasonable conditions — namely, a limitation in respect of the mode or manner in which the trade is to be carried on. The above are the three kinds of partial restraint recognized by law. The English rule, which strikes indifferently at all general restraints in trade, makes the validity of a partial restraint depend on the circumstances of each case. A partial restraint will be binding in law if made on good consideration and if it is reasonable." As illustrating the case of partial restraints where the contract leaves to the covenantor the right to trade with particular persons, he cites *Young v. Timmins*, 1 Tyrw. 226; *Wallis v. Day*, 2 M. & W. 278; *Rannie v. Irvine*, 7 M. & G. 969; *Pilkington v. Scott*, 15 M. & W. 657. As illustrating the third class of partial restraints, or those in which the restraint "regulates or confines the manner in which the trade is to be worked," he cites the cases of *Collins v. Locke*, L. R., 4 App. Cas. 674, and *Jones v. Lees*, 1 H. & N. 189.

He sums up his conclusions as follows: "The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, or persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and when they do not extend further than is necessary for the reasonable protection of the covenantor. A limit in time does not, by itself, convert a general restraint into a partial one. That which the law does not allow is not to be tolerated because it is to last for a short time only. In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider." The exceptions to the rule that general restraints are void, to which the learned judge refers, are evidently cases relating to the sale of trade secrets and patents or businesses protected by patents.

Undoubtedly, by thus curtailing the scope of general restraints and enlarging that of partial restraints, something is gained in the way of reconciling the "jarring opinions," or rather something is gained in support of an arbitrary rule because there are fewer cases that impinge it. But still the arbitrary rule remains that general restraints, thus curtailed, are void, irrespective of the question of reasonableness, and that courts are bound to pronounce against such restraints without stopping to look into the circumstances under which they are made. There does not seem to be any more reason for upholding this rule than for upholding the rule that restraints, general as to space, are void. It still remains true, we think, that there is not any English case in which a general restraint as defined by Mr. Justice BOWEN has been held void, when the restraint was one which would withstand the ordinary tests of reasonableness, as applied in cases of partial restraints. Mr. Justice BOWEN does not

cite any. On the other hand, there are at least five English cases in which restraints were held valid which forbid the covenantor to carry on the business in question in any manner or with any persons within the kingdom. These are: *Whittaker v. Howe*, 3 Beav. 383 (1841); *Leather Cloth Co. v. Lorisont*, L. R., 9 Eq. Cas. 345 (1869); *Rousillon v. Rousillon*, 14 Ch. Div. 351 (1880); *Badische Anilin & Soda Fabrik v. Schott*, (1892) 3 Ch. 447; *Moenich v. Fenestre*, 61 L. J. Ch. 737 (1892). If we exclude *Leather Cloth Co. v. Lorisont*, as based upon the sale of a trade secret, there still remain three cases, and to these may be added the *Maxim-Nordenfeldt* case itself, in which Mr. Justice BOWEN formulated the theory of partial and general restraints now under discussion. In that case the defendant was restrained from carrying on the specified business anywhere or in any manner, except on behalf of the plaintiff company, for the period of twenty-five years. The company was obligated to employ the defendant as its managing director for the space of seven years only, and was not obligated to employ him in any capacity after that. He thus retained no right to carry on the business after the seven years, and the restraint was practically absolute after that time. It is true the defendant was a stockholder in the plaintiff company and thus had an interest in its business. But if this alone made the restraint partial, then Mr. Justice BOWEN would have to further revise his definitions and add a fourth class of partial restraints, viz., where the covenantor retained an interest in the business, as stockholder or otherwise, though he might be restrained from carrying it on personally anywhere or in any manner.

In *Whitney v. Slayton*, 40 Maine, 224, where the defendant had sold his iron foundry to the plaintiff and agreed not to engage in the business of iron casting for ten years within a prescribed territory, it was held that the defendant had violated the covenant by organizing a corporation to carry on the business and becoming a stockholder and manager thereof. But the defendant had built the plant on his own responsibility and then turned it over to the corporation, and was doubtless its principal stockholder and the mainstay of the business. Similar cases are *Beal v. Chase*, 81 Mich. 489, and *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442. In all three cases the covenantor was an active participant in the business. If merely becoming a stockholder in a corporation carrying on the prohibited business would constitute a violation of a covenant not to engage in that business, then it would follow that if the covenantor retained an interest in the business as a stockholder he would still be carrying it on in a qualified sense, and a restraint otherwise general, but which permitted him to retain such interest, would be a partial restraint within Mr. Justice BOWEN's definition. But no case has held that merely becoming a stockholder in a corporation carrying on a business is a violation of a covenant not to engage in that business. In the Maine case just cited it is said: "If the defendant was interested as a stockholder in such corporation it cannot be doubted that he was engaged in the business of iron casting within the meaning of the contract. This would put him most emphatically in a position to carry out extensively the very objects which it must have been the intention of the parties to prevent; and his being in the service of the corporation carrying on the business was alike a violation of the contract." But this language must be taken in connection with the facts of

the case and qualified accordingly. If the retaining an interest as a stockholder in a business as to which the restraint is given is alone sufficient to make the restraint partial, then the retaining one share out of 10,000 or 100,000 might determine the important question whether the restraint is valid or void.

There are a number of American cases in which general restraints, as defined by Mr. Justice BOWEN, were held valid. They are: *Morse Twist Drill & Machine Co. v. Morse*, 108 Mass. 73 (1869); *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64 (1873); *Beal v. Chase*, 31 Mich. 489 (1875); *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442 (1882); *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (1887); *Watertown Thermometer Co. v. Pool*, 51 Hun, 157 (1889); *Underwood v. Smith*, 19 N. Y. Supp. 880 (1892); *Carter v. Alling*, 48 Fed. Rep. 208 (1890); *Oakdale Mfg. Co. v. Garst*, post (1894). The first of these cases is very like the *Maxim-Nordenfeldt* case. The defendant sold out his business to the plaintiff company and became a stockholder therein and its superintendent. But there was no agreement to employ him beyond three years and the restraint was unlimited in time. In *Diamond Match Co. v. Roeber* defendant sold his business and agreed not to engage therein except as agent or employee of the vendee. He was also to become a stockholder in the vendee and did become one in the plaintiff company, which succeeded to the rights of the vendee. There does not appear to have been any agreement on the part of the vendee to employ the defendant, but he was employed for several years. In *Oakdale Mfg. Co. v. Garst*, the defendant transferred his business to the plaintiff company, for stock in such company but it does not appear that he was to be employed by the company. If these cases are excluded as coming under the head of partial restraints, the others remain and are not subject to any qualification. But it would not seem that a restraint otherwise general and absolute was rendered partial by reason of a permission that the covenantor may carry on the business in question on behalf of, or as agent or employee of the covenantee, unless the *right* to so carry on the business is secured to the covenantor *for the entire term of the restraint*.

Besides the cases referred to by Mr. Justice BOWEN and cited above, the following are also instances of restraints which, though unlimited as to space, were otherwise limited, so as to fall within his definition of partial restraints: *Hartley v. Cummings*, 5 C. B. 247; 57 E. C. L. R. 246 (1847); *Gale v. Read*, 8 East, 80 (1806); *Mills v. Dunham*, (1891) 1 Ch. 576. There are American cases which doubtless fall within the same category. *Matthews v. Associated Press*, 186 N. Y. 833; 32 N. E. Rep. 981 (1893); *National Benefit Co. v. Union Hospital Co.*, 47 Minn. 272; 47 N. W. Rep. 806 (1891); *Chicago, etc., R. Co. v. Pullman So. Car Co.*, 139 U. S. 79 (1891); 4 Am. R. R. & Corp. Rep. 213. See, also, §§ 21 and 25 below. But to hold a partial restraint valid is by no means equivalent to holding a general restraint void. Nor does the latter proposition follow logically from the former. When the restraint in litigation is partial, it is unnecessary to decide upon general restraints, and what is said upon the subject is dictum. And whenever a general restraint has been able to bear the tests of reasonableness applied to partial restraints, it has been held valid by the English courts. The only exceptions are to be found in the three or four American cases noticed in the last section.

The distinction between general and partial restraints is purely arbitrary. Even Mr. Justice BOWEN does not attempt to give it any rational basis. Being arbitrary it can be evaded by an arbitrary exception. If the court will consider the reasonableness of a restriction which covers three-fourths of a state, there is no reason why it should not consider the reasonableness of one that covers nine-tenths or nineteen-twentieths, and so on until the minutest fraction remains. It would follow, then, that if the restraint forbids the covenantor to carry on business anywhere in the state, with anybody or in any manner, the courts are precluded from considering its reasonableness and are bound to pronounce it void, but if the covenantor is left free to carry on the business in any part, however small, with any persons, however few, or in any manner, however restricted, then the restraint is valid if reasonable. Such a position is manifestly unsound.

C. VALIDITY OF RESTRAINTS — GENERAL PRINCIPLES — REASONABLENESS THE TEST.

8. Grounds upon which contracts in restraint of trade have been held void—public policy infringed by reason of injury to the individual and injury to trade.—The reasons given by Chief Justice PARKER in *Mitchell v. Reynolds*, 1 P. Wms. 181, why contracts in restraint of trade are invalid are as follows: “First. The mischief which may arise from them, first, to the party by the loss of his livelihood and the subsistence of his family; secondly, to the public, by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations, who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves. Thirdly. Because, in a great many instances, they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other.”

The court in *Alger v. Thacher*, 19 Pick. 51 (1837), gives the reasons as follows: “1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such person to imposition and oppression.

“2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

“3. They discourage industry and enterprise, and diminish the products of industry and skill.

“4. They prevent competition and enhance prices.

“5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the

means, unless restrained by law, to exclude rivalry, monopolize business and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." These reasons are summarized by the same court in *Bishop v. Palmer*, 146 Mass. 469, 474, as follows: "Two principal grounds upon which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly."

In the opinion of Mr. Justice BRADLEY in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 68 (1873), it is said: "There are two principal grounds upon which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family." In the principal case such contracts are said to be against public policy "for the reason that such contracts tend to deprive the public of the services of the parties in the employments and capacities in which they are most useful, and that they tend to expose the public to the evils of monopoly." Mr. Spelling, in his work on *Trusts and Monopolies*, section 3, states the reasons as follows: "The rule of public policy contravening contracts in restraint of trade is based upon two reasons or motions. One is that the performance of such contracts injures the public by depriving it of the restricted party's skill and industry; the other, that the restricted party is himself injured because seeking thereby to preclude himself from pursuing his occupation, and thus being prevented from supporting himself and his family, and indirectly threatening the public with becoming burdened with their support," See, also, *Wright v. Ryder*, 36 Cal. 342; *Lawrence v. Kidder*, 10 Barb. 641; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442; *Leather Cloth Co. v. Lorsche*, L. R., 9 Eq. Cas. 345. We believe no reasons have ever been assigned for the invalidity of contracts in restraint of trade that are not to be found in the foregoing statements, and all these reasons may be summarized as follows. Contracts in restraint of trade, with certain exceptions, are held to be void because contrary to public policy, and they are contrary to public policy, first, because they tend to injure the party restricted by preventing him from pursuing his trade within the restricted limits; second, because they tend to injure the public by depriving it of the benefit of the restricted party's industry and by threatening it with liability for his support; third, because they tend to prevent competition and to encourage monopoly. In the first two of these reasons the injury to the public is by reason of the injury to the party restrained, and in the third by reason of the injury to trade in general. All the reasons, therefore, which have been assigned for the invalidity of contracts in restraint of trade may be comprehended in these two; first, because of their injurious effects upon the party restrained, and, second, because of their injurious effects upon trade.

9. **The test of validity is the reasonableness of the restraint.**—The review of cases already made seems to us to demonstrate that there is no hard and fast rule that general restraints of trade are invalid. The

rule was formulated as a dictum at a time when it was inconceivable that a general restraint could be reasonable. It was reiterated time and again in cases which did not call for a decision upon the point, until it was accepted as one of the fundamental rules of the law. But as soon as a case arose in which the restraint was both general and reasonable the rule was disregarded and the restraint held valid, and this has been the case ever since, with only two or three exceptions. What, then, is the test of validity as regards the extent of the restraint? This question has probably never been better answered than by TIDNALL, Ch. J., in *Horner v. Graves*, 7 Bing. 735 (1831), who says: "But the greater question is whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." This rule has been often quoted and approved. The rule has been otherwise stated in various cases, as follows: "The limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made." *Ward v. Byrne*, 5 M. & W. 547. So in *Tallis v. Tallis*, 1 El. & Bl. 391; 72 E. C. L. R. 390 (1853). "The principle deducible from all the cases is that the question to be determined is, whether the restraint, having regard to all the circumstances of the case and the nature of the employment, is greater than is necessary for the protection of the person in whose favor it is imposed. LOPES, L. J., in *Mills v. Dunham*, (1891) 1 Ch. 576, 587. "The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenantor must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business." *Dunlop v. Gregory*, 10 N. Y. 241 (1851). "The test of the reasonableness of such restriction is, whether it is such as only affords a fair protection to the party in whose favor it is made, and at the same time does not militate against the public interest." *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442 (1882). So in *Ross v. Sadgbeer*, 21 Wend. 166 (1839). "If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid." *Hubbard v. Miller*, 27 Mich. 15, 19. This was quoted and approved in *Hedge v. Lowe*, 47 Iowa, 137 (1877).

In *National Benefit Co. v. Union Hospital Co.*, 47 Minn. 272; 47 N. W. Rep. 806 (1891), it is said: "The general consensus of all the authorities, at least the later ones, is that there is no hard and fast rule as to what contracts are void as being in restraint of trade; but each case must be judged according to its own facts and circumstances; that a party may legally purchase the business and trade of another for the very purpose of removing or preventing

competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory; and the question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it is made; and the limits of restraint as to space depend upon the kind of trade or business which is the subject of the contract."

In *Gibbs v. Consolidated Gas Co.*, 130 U. S. 395, 409, and *Fowle v. Park*, 181 U. S. 88, 96, 97, it is said: "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."

In an article upon "Contracts in Restraint of Trade," in 4 *Harv. Law Rev.* 128, the writer, after referring to a great number of cases, says: "We conclude, therefore, that the true test in considering the legality of a condition or covenant in restraint of trade, is not whether the restraint covers the whole state or nation, but it is whether the restraint is reasonable; and in determining this question the court will inquire whether it is necessary for the protection of the complainant, and is not injurious to the public." P. 136.

All these statements of the rule come to substantially the same thing, that the restraint is valid if reasonable, and that it is reasonable if it does not impose upon one party any restriction which is not necessary for the reasonable protection of the other, and if it is not injurious to the public by reason of its effects upon trade. This rule is either expressly enunciated or is clearly deducible from the great majority of the cases, whether they relate to general or partial restraints. *Keith v. Herschberg Optical Co.*, 48 Ark. 188 (1886); *California Steam Nav. Co. v. Wright*, 6 Cal. 258 (1854); *Cook v. Johnson*, 47 Conn. 175 (1879); *Beard v. Dennis*, 6 Ind. 200 (1855); *Martin v. Murphy*, 129 Ind. 464; 28 N. E. Rep. 1118 (1891); *Whitney v. Slayton*, 40 Maine, 224 (1855); *Stearns v. Barrett*, 1 Pick. 443, 450 (1823); *Alger v. Thacher*, 19 Pick. 51 (1837); *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73 (1869); *Beal v. Chase*, 31 Mich. 489 (1875); *National Benefit Co. v. Union Hospital Co.*, 47 Minn. 272; 47 N. W. Rep. 806 (1891); *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. Rep. 348 (1891); *Ellerman v. Chicago Junction Rys. & Union Stock Yards Co.*, 49 N. J. Eq. 217; 23 Atl. Rep. 287 (1891); *Chappel v. Brockway*, 21 Wend. 157 (1839); *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (1887); *Watertown Thermometer Co. v. Pool*, 51 Hun, 157 (1889); *Underwood v. Smith*, 19 N. Y. Supp. 380 (1892); *Lange v. Werke*, 2 Ohio St. 519 (1853); *Smith's Appeal*, 113 Penn. St. 579 (1886); *Herreshoff v. Boutineau*, 17 R. I. 3; 19 Atl. Rep. 712 (1890); *Oakdale Mfg. Co. v. Garst*, post (1894); *Anheuser-Busch Brewing Assn. v. Houck*, (Tex. Civ. App.) 27 S. W. Rep. 692; *Kellogg v. Larkin*, 3 Pin. (Wis.) 123; 3 Chand. 133 (1851); *Berlin Machine Works v. Perry*, 71 Wis. 495 (1888); *Richards v. American Desk & Seating Co.*, ante (1894); *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64 (1873); *Carter v. Alling*, 43 Fed. Rep. 208 (1890); *Mossop v. Mason*, 18 Grant Ch. 453 (1871); *Homer v. Ashford*, 3 Bing. 322 (1825); *Hitchcock v. Coker*, 6 A. & E. 438; 33 E. C. L. R. 241 (1837); *Whittaker v. Howe*, 2 Beav. 383 (1841); *Harms v. Parsons*, 32 Beav. 328 (1863); *Rannie v. Irvine*, 7 M. & G. 969 (1844);

Mallan v. May, 11 M. & W. 652 (1843); *Pilkington v. Scott*, 15 M. & W. 657 (1846); *Leather Cloth Co. v. Lhorsont, L. R.*, 9 Eq. Cas. 345 (1869); *Printing & Numerical Registering Co. v. Sampson, L. R.*, 19 Eq. Cas. 462 (1875); *Collins v. Locke, L. R.*, 4 App. Cas. 674 (1879); *Rousillon v. Rousillon*, 14 Ch. Div. 851 (1880); *Roggers v. Maddocks*, (1892) 3 Ch. 346; *Badische Anilin & Soda Fabrik v. Schott*, (1892) 3 Ch. 447; *Moenich v. Fenestre*, 61 L. J. Ch. 737 (1892); *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630; (1894) App. Cas. 535.

In *Leather Cloth Co. v. Lhorsont, L. R.*, 9 Eq. Cas. 345, JAMES, V. C., says: "All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that everybody shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do that, does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

In the last English case upon the subject, it is said: "It appears, however, to me that the time for a new departure has arisen, and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest." Per Lord WATSON in *Nordenfeldt v. Maxim-Nordenfeldt Guns & Ammunition Co.* (1894) App. Cas. 535, 575.

10. The reasonableness of the restraint is to be considered in two aspects: First, as respects the parties, and, second, as respects the public.—We have already shown that the various grounds upon which restraints of trade have been held void may be reduced to two, viz.: First, because of their injurious effects upon the party restrained; second, because of their injurious effects upon trade. See § 8. A contract in restraint of trade, by its very terms, imports a contract which affects the parties and which affects trade, and these alone. If the public is injured by such a contract, it must necessarily be either by its operation upon the parties, or by its operation upon trade, or both. If the public is not injured in either way, it is not injured at all, and the contract is valid. Such a contract is *reasonable* when it is *reasonable* in its operation upon the parties and *reasonable* in its operation upon trade; or, in other words, when it produces no *unreasonable* injury to the parties and no *unreasonable* injury to trade.

In most cases the question of reasonableness, is considered only with reference to the parties, and this is so because the circumstances are such that the public interests are not affected if the parties are not prejudiced. But it will not do to formulate a rule from such cases that a restraint is valid if reasonable as between the parties. A restraint may be reasonable as between the parties and still be injurious to the public. This double aspect of the question is recognized in most of the cases quoted from in section 9 of this note. It is made especially prominent in the Maxim-Nordenfeldt case, (1893) 1 Ch. 680, in which LINDLEY, L. J., says: "In Rousillon v. Rousillon Lord Justice FRY * * * came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade, given for valuable consideration, was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord Justice JAMES in Leather Cloth Company v. Lorstont, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard it as finally settled, nor, indeed, as quite correct. This doctrine ignores the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can." Pp. 649, 650. And in the same case BOWEN, L. J., says: "For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint ought not, in my judgment, to apply when a trader or manufacturer finds it necessary, for the advantageous transfer of the good will of a business in which he is interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; and a rule founded on public policy does not admit of any exception that would really produce public mischief; such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use — a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important." Pp. 667, 668. And in the same case in the House of Lords, it is said by Lord MACNAGHTEN: "It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public." (1894) App. Cas. 535, 565. The matter is thus put by the court in Anheuser-Busch Brewing Assn. v. Houck, (Tex. Civ. App.) 27 S. W. Rep. 672 (1894), in speaking of contracts in partial restraint of trade, that such contracts "are not contrary to public policy if the restriction is *reasonable* as to time and place, and *reasonable* also in its effects upon the public." The various expressions of opinion upon the subject seem most accurately stated by saying that restraints are valid when they are reasonable as respects the parties, and also reasonable as respects

the public. As to what constitutes reasonableness in either aspect will be further considered in the following sections.

D. REASONABLENESS AS RESPECTS THE PARTIES.

11. When the restraint is reasonable and when unreasonable as respects the parties.—The result of the authorities is that a restraint is reasonable, as between the parties, when it is no greater in any respect than is necessary for the fair protection of the party in whose favor it is made, or when no restraint is imposed upon one party that is not beneficial to the other. On the other hand, a restraint which is unnecessary for the protection of the covenantee is unreasonable, and if the covenant is indivisible, the whole is void. The authorities are fully set forth in section 8, ante.

The extent of restraint which is required for the reasonable protection of the party in whose favor it is made is a question which must be determined according to the peculiar circumstances of each case. What was said by TINDALL, Ch. J., in *Horner v. Graves*, 7 Bing. 735, 743, is true in every case, that "no certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which, excessive." The court cannot enter upon any nice calculations. All the circumstances affecting the trade or business should be looked to. In *Hitchcock v. Coker*, 6 A. & E. 438; 33 E. C. L. R. 241 (1837), it is said by TINDALL, Ch. J.: "Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighborhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require." P. 249. See, also, *Oakdale Mfg. Co. v. Garst*, post, and *Herreshoff v. Boutineau*, 17 R. I. 3; 19 Atl. Rep. 712. "As to what shall be deemed a reasonable limitation, there is, and from the nature of things can be, no definite rule. It must depend upon the circumstances of each particular case and the good sense and sound discretion of the tribunal which may have the case to settle." *Alger v. Thacher*, 19 Pick. 51, 54.

It would seem a just rule that what the parties have agreed upon as necessary and proper should be sustained as reasonable by the courts, unless manifestly excessive. "Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract." *Herreshoff v. Boutineau*, 17 R. I. 3; 19 Atl. Rep. 712. It is said by TINDALL, Ch. J., in *Hitchcock v. Coker*, 6 A. & E. 438; 33 E. C. L. R. 241, that if the restraint is "larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be, therefore, void." This is, undoubtedly, a correct proposition. But it does not necessarily follow that a restraint is to be deemed reasonable unless it is larger than the protection of the covenantee can possibly require. Yet it has been so held, and particularly in *Rousillon v. Rousillon*, 14 Ch. Div. 351, and *Badische Anilin & Soda Fabrik v. Schott*, (1892) 3 Ch. 447. In the latter case CHITTY, J., says: "If

the restraint is not greater than can possibly be required for the protection of the covenantee, it is not unreasonable." The better rule would seem to be that laid down by TINDALL, Ch. J., in *Horner v. Graves*, 7 Bing. 735, 744, as follows: "Unless the case was such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering."

E. REASONABLENESS AS RESPECTS THE PUBLIC — CASES CLASSIFIED AND CONSIDERED WITH RESPECT TO THEIR EFFECT UPON TRADE.

12. When the restraint is reasonable and unreasonable as respects the public.— No definite rules can wisely be laid down as to when a restraint will be reasonable and when unreasonable as respects the public. Each case must necessarily be determined according to its own peculiar circumstances. What is reasonable to-day may be unreasonable to-morrow, in consequence of the changes in the circumstances and conditions of trade and in the habits and opinions of the people, and vice versa. If a restraint of trade is reasonable as respects the parties, then it can only injure the public by injuring trade. But it is not every injury to trade that makes the restraint unreasonable. The injury may be doubtful or slight, or injury in one direction may be compensated by advantages in another, or the trade may be one which is better restrained than free. The restraint is unreasonable only when it produces a material or unreasonable injury to a useful trade. To determine the question it is necessary to consider the nature of the trade restrained, the situation and circumstances of the parties, the character of the transaction in which the restraint is given, the objects which the parties had in view, and the effect which the enforcement of the restraint is calculated to have upon the public welfare. Will the public be deprived of the opportunity of obtaining any useful or desirable commodity or service, will the price be unduly enhanced, supply or production unduly restricted, quality depreciated or the trade monopolized? These questions cannot be answered by general rules, but only by looking to the facts of each case. The only use that can be made of precedents is to group the cases according to their related facts and ascertain under what circumstances restraints have been held to be an unreasonable injury to trade and under what circumstances not.

13. Upon the sale of a business to be continued by the vendee, the public is not injured by a restraint of the vendor, which is reasonable as between the parties.— A majority of the cases involving contracts in restraint of trade have arisen out of the sale of a business or some interest therein, in which the vendor has agreed to some restraint upon his right to engage in the same business. In the *Maxim-Nordenfeldt* case, (1893) 1 Ch. 630, BOWEN, L. J., after referring to the maxims "that no one should be allowed to contract himself out of his liberty to trade," and "that every man should be at liberty to sell the good will of his trade on any terms that are neither oppressive to himself nor injurious to the state," says: "The history of the entire doctrine as to restraint in trade is nothing but a narrative of the continual efforts of the English law amidst all the changing conditions of English industry and commerce, to adjust and harmonize these two opposite points of view."

The restraint is reasonable if no greater than is necessary for the protection

of the vendee in respect of the business bought. See §§ 9-11. It is reasonable for the vendee to obtain such restraint, for otherwise the value of what he bought might be destroyed. It is reasonable for the vendor to give it, because he is thereby enabled to obtain an enhanced price for his property. The parties are benefited, and the public is in no way injured, because the business goes on as before, and it is presumably immaterial to the public whether it is owned and conducted by the vendor or vendee. The following are cases of this class, in all of which the covenant was sustained: *Goodman v. Henderson*, 58 Ga. 567; *Evans v. Elliott*, 21 Ind. 288 (1868); *Hedge v. Lowe*, 47 Iowa, 137 (1877); *Smalley v. Greene*, 52 Iowa, 241 (1879); *Arnold Bros. v. Kreutser*, 67 Iowa, 214 (1885); *Mueller v. Kleine*, 27 Ill. App. 473 (1888); *Wintz v. Vogt*, 3 La. Ann. 16 (1848); *Verges v. Forshee*, 9 La. Ann. 294 (1854); *Whitney v. Slayton*, 40 Maine, 224 (1855); *Burrill v. Doggett*, 77 Maine, 545 (1885); *Guerand v. Daudelet*, 32 Md. 561 (1870); *Pierce v. Woodward*, 6 Pick. 206 (1828); *Angier v. Webber*, 14 Allen, 211 (1867); *Cushing v. Drew*, 97 Mass. 445 (1867); *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 78 (1869); *Boutelle v. Smith*, 116 Mass. 111 (1874); *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149 (1889); *Beal v. Chase*, 31 Mich. 489 (1875); *Peltz v. Eichele*, 63 Mo. 171 (1876); *Gill v. Ferris*, 82 Mo. 156 (1884); *Chappel v. Brockway*, 21 Wend. 157 (1839); *Francisco v. Smith*, (N. Y.) 38 N. E. Rep. 980; *Underwood v. Smith*, 19 N. Y. Supp. 380 (1892); *Baumgarten v. Broadway*, 77 N. C. 8 (1877); *Lange v. Werke*, 2 Ohio St. 519 (1853); *Morgan v. Perhamus*, 36 Ohio St. 517 (1881); *Welsh v. Morris*, 81 Tex. 159; 16 S. W. Rep. 744; *Washburn v. Dosch*, 68 Wis. 436 (1887); *Archer v. Marsh*, 6 A. & E. 959; 33 E. C. L. R. 498 (1887); *Proctor v. Sargent*, 2 Scott N. R. 289 (1840); *Harms v. Parsons*, 32 Beav. 828 (1863); *Hinde v. Gray*, 1 Scott N. R. 123; S. C., 1 M. & G. 195; 39 E. C. L. R. 715 (1840); *Wallis v. Day*, 2 M. & W. 273 (1837); *Rannie v. Irvine*, 7 M. & G. 969 (1844); *Ainsworth v. Bentley*, 14 Wkly. Rep. 630 (1866); *Ingram v. Stiff*, 5 Jur. (N. S.) 947 (1859); *Leather Cloth Co. v. Lorisont*, L. R., 19 Eq. Cas. 345 (1869); *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630; (1894) App. Cas. 535.

In the following cases, belonging to the same class, the restraint was held void, because unreasonable as between the parties: *More v. Bonnet*, 40 Cal. 251 (1870); *Bishop v. Palmer*, 146 Mass. 469 (1888); *Gamewell Fire Alarm Tel. Co. v. Crane*, 160 Mass. 50 (1893), ante, p. 78; *Messop v. Mason*, 18 Grant Ch. 453 (1871).

It is not necessary that the vendee should covenant to continue the business. But to bring the case within the class under consideration, it must appear that such was his intention. This would be the natural presumption in any case, for the only alternative is the presumption that the business was bought for the purpose of being destroyed or abandoned. When the latter purpose appears, a different case is made, which will be considered in a subsequent note. In the cases cited it appeared that the business actually was continued by the vendee, and the suits were brought to protect the very business sold.

14. Whether the restraint may not only be coextensive with the trade or business as it exists, but may cover any contemplated or probable expansion thereof.—In *Oakdale Mfg. Co. v. Garst*, post, three concerns

engaged in the manufacture and sale of butterine and oleomargarine consolidated under corporate management, conveyed their factories and business to the corporation for stock therein, and each agreed not to engage or be interested in the same business for five years. The restraint was world wide. It does not appear how extensive a business the defendant had carried on before the consolidation, but it does appear that the new corporation contemplated dealing wherever a market could be found. The court held that the restraint was reasonable under the circumstances, and says: "The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operations. To allow the respondent now to overthrow that agreement would be grossly inequitable." So in *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, a restraint extending to the whole United States was held valid, chiefly on the ground of an allegation in the bill, admitted by demurrer, that the business required for its full and proper development the whole United States. That is, the reasonableness of the stipulation was based upon the future contemplated development of the business and not upon its past extent. The following cases tend somewhat in the same direction: *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73; *Dwight v. Hamilton*, 118 Mass. 175; *Guerand v. Daudelet*, 32 Md. 561; *Leather Cloth Co. v. Lorisont*, L. R., 9 Eq. Cas. 345. In these cases a covenant not to compete with the vendee of a business was held valid, and this would cover the future expansion of the business. But such covenants might be construed to refer to the business as it existed at the time of the contract.

The following cases hold, in effect, that a covenant to protect the future growth or expansion of the business is invalid: In *Baines v. Gray*, 35 Ch. Div. 154, the plaintiff was engaged in the business of selling milk, and the defendant engaged as an employee as milk carrier, and agreed that "he will not during such service, or after quitting such service, serve, or cause to be served, with milk or any other dairy produce, for his own benefit, or that of any other person or persons, * * * any customers served or belonging at any time to the said Clement Baines, his successors or assigns." It was held that the covenant was divisible into two parts, one relating to those who were customers of the plaintiff during the defendant's employment, and the other relating to those who should become customers afterwards, and it was held that the covenant was valid as to the former and void as to the latter. *Nicholls v. Stretton*, 10 Q. B. 346, is a very similar case. In that case the defendant, on being articulated for five years to the plaintiff, who was a solicitor, covenanted that he would not, during the five years, "nor at any time after the expiration of the term," etc., do business "for any person who had already been, or who should, from time to time thereafter, become or be, the client," of the plaintiff. The decision was the same as in the former case. So, also, *Allsop v. Wheatcroft*, L. R., 15 Eq. Cas. 59. In the *Maxim-Nordenfeldt* case, (1898) 1 Ch. 630, that part of the covenant by which the defendant bound himself

not to engage "in any business competing or liable to compete in any way with that for the time being carried on" by the plaintiff, was apparently considered as invalid for a similar reason.

15. The same rule applies to the sale of a professional business as to any other.—The following cases support this proposition, and differ from those cited in the last two sections only in the nature of the business to which they relate: *Cook v. Johnson*, 47 Conn. 175 (1879); *Mell v. Mooney*, 30 Ga. 413; *Linn v. Sigsby*, 57 Ill. 75; *Miller v. Elliott*, 1 Ind. 484; *Martin v. Murphy*, 129 Ind. 464; 28 N. E. Rep. 1118 (1891); *Gilman v. Dwight*, 13 Gray, 356 (1859); *Dwight v. Hamilton*, 113 Mass. 175 (1873); *Zimmerman v. Deven*, 52 Mich. 34; *Thompson v. Means*, 11 S. & M. 604; *Smith v. Smith*, 4 Wend. 468; *Mott v. Mott*, 11 Barb. 127; *Holbrook v. Waters*, 9 How. Pr. 335; *Baker v. Cordon*, 86 N. C. 116; *McClurg's Appeal*, 68 Penn. St. 51 (1868); *Wilkinson v. Colley*, (Penn.) 30 Atl. Rep. 286 (1894); *French v. Parker*, 16 R. I. 219; 14 Atl. Rep. 870 (1888); *Butler v. Burleson*, 16 Vt. 176 (1841); *Davis v. Mason*, 5 T. R. 118 (1793); *Haywood v. Young*, 2 Chitty, 407 (1818); *Bunn v. Guy*, 4 East, 190 (1803); *Hastings v. Whitley*, 2 Exch. Rep. 611; *Mallan v. May*, 11 M. & W. 652 (1843); *Whittaker v. Howe*, 3 Beav. 383 (1841).

16. So when a partner sells out his interest in the business to his associates.—In such a case if the restraint imposed upon the retiring partner is reasonable as between the parties, the public can suffer no injury. There is a mere change in the personnel of the firm, and the business goes on as before. It matters not to the public whether it is the old firm or the new which conducts the business. The reasonableness of the restraint between the parties depends upon the same principles as where the entire business is transferred. The following cases are of this class: *Roller v. Ott*, 14 Kans. 609 (1875); *Warfield v. Booth*, 33 Md. 63 (1870); *Dean v. Emerson*, 102 Mass. 480 (1869); *Carll v. Snyder*, (N. J. Eq.) 26 Atl. Rep. 977 (1893); *Richardson v. Peacock*, 26 N. J. Eq. 40; 28 N. J. Eq. 151; 33 N. J. Eq. 597; *Nobles v. Bates*, 7 Cow. 307 (1827); *Curtis v. Gokey*, 68 N. Y. 300 (1877); *Lange v. Werke*, 2 Ohio St. 519 (1853); *Thomas v. Miles' Admr.*, 3 Ohio St. 274 (1854); *Smith's Appeal*, 113 Penn. St. 579 (1886); *Berlin Machine Works v. Perry*, 71 Wis. 495; *Green v. Price*, 13 M. & W. 694 (1845); *S. C.*, affirmed, 16 M. & W. 346 (1847); *Gale v. Read*, 8 East, 80 (1806); *Tallis v. Tallis*, 1 El. & Bl. 391; 72 E. C. L. R. 390 (1853); *Davies v. Davies*, 36 Ch. Div. 359 (1887).

17. So where one is taken into a partnership and covenants not to enter into the same business in the same territory in case of his retirement from the firm.—This is not materially different from the last case. It is manifest that if the restraint in such case is reasonable as between the parties the public would suffer no injury, as trade would not be affected. *Taylor v. Blanchard*, 13 Allen, 370 (1866), is such a case, but the covenant was held void because too extensive. *Carroll v. Giles*, 30 S. C. 412 (1888), may be considered in this connection. The facts were these: Giles was a barber in Bennettsville, who had no shop, but went about from place to place in pursuit of his calling. Carroll had a shop, and the two made an agreement by which Carroll was to furnish and maintain the shop, pay the rent and all expenses and Giles was to manage the same and the gross receipts were to be equally divided. Giles also agreed "not to do any work now or hereafter

outside the shop owned by H. W. Carroll, or hire to any party or parties, or open a shop of any kind to carry on the barber business, either directly or indirectly, in Bennettsville, S. C." The defendant afterwards left the plaintiff's shop and set up one of his own in Bennettsville. The court held that the restraint was void for reasons which are stated as follows: "There was no sale here of a 'business' and 'good will' by the defendant, in which the price paid was enhanced by the vendor stipulating not to carry on the same business in a specified locality and for a specified time. It is true that the defendant was a barber, going about the town and county barbering, but had no shop, patronage or good will to sell. The plaintiff did not purchase his outfit from the defendant, giving him a liberal price in consideration of his unusual stipulation to stay with him or go out of the business. It seems to us that the contract was really nothing more than one of a partnership indefinite in duration, in which one party stipulated to furnish the capital or outfit and the other to contribute his labor and skill, 'dividing the gross receipts equally;' and that the stipulation on the part of the defendant never to do any barbering in Bennettsville outside of the plaintiff's shop 'now or hereafter' was unreasonable, and not of such a character as to call for the exercise of the equitable jurisdiction in requiring it to be specifically performed."

It seems difficult to approve this decision upon any rational basis. The covenant was limited solely to the carrying on of a barber business in Bennettsville, or else it was divisible into three distinct parts. That is, it was either an agreement (1) not to do any work in the barber business in Bennettsville, now or hereafter, outside the shop owned by Carroll; (2) or hire to any party or parties in the barber business in Bennettsville; (3) or open a shop of any kind to carry on the barber business in Bennettsville; or else it was an agreement, (1) not to do any work (of any kind, anywhere or at any time); (2) or to hire to any party or parties (to do any kind of work, anywhere or at any time); (3) or to open a shop of any kind to carry on the barber business, either directly or indirectly, in Bennettsville, S. C. If we adopt the former alternative we have a restraint limited to carrying on the barber business in Bennettsville, which, according to all the authorities, was reasonable and upon a good consideration. If we adopt the latter alternative, the covenant was divisible (see § 37, post), and the part as to opening a shop in Bennettsville was good for the reason just stated. It further appears from the case that after the defendant quit the plaintiff's shop they made a new agreement by which the defendant was to manage the shop for ten cents an hour, until the plaintiff could get some one else to take charge of it. The Supreme Court makes no account of this subsequent agreement in deciding the case.

17. So where one having a controlling interest in a corporation, and engaged in prosecuting its business, sells his stock and retires from the business.—This class of cases stands upon substantially the same footing as where a partner sells his interest and retires from the partnership. See *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442 (1882); *Watertown Thermometer Co. v. Pool*, 51 Hun, 157 (1889); *Alger v. Thacher*, 19 Pick. 51 (1837). In such case the business is continued as before and under the same name and legal ownership. Trade is not affected and the public is not interested. If the vendor of the stock is familiar with the business and

customers of the corporation, he might destroy or greatly impair its value if he could not be restrained from setting up the same business in the same territory. Hence, a covenant not to do so would be reasonable as between the parties, and the public would not be injuriously affected. Whether the same rule would apply, regardless of the amount of stock sold and regardless of the vendor's participation in the business, is a question that does not seem to have arisen. In case of partnership no distinction appears to have been made, based upon the extent of the retiring partner's interest.

19. Where a person enters into the employ of another, an agreement that he will not, after the termination of the employment, engage in the same business in any way or manner in the same place or territory is not injurious to the public.—In such case, so far as the public is concerned, trade is not affected at all. If the employment is terminated the employer's business goes on as before and the public enjoy the benefit of the trade as formerly. The only way in which the public can suffer injury is through the party restrained, but, if the restraint is reasonable, that is, such as it is for the interest of the parties to make, then there is no injury to any one. That the capacity to enter into reasonable restraints of this sort is for the advantage of the parties seems manifest and has been often affirmed. In *Horner v. Ashford*, 3 Bing. 822 (1825), in which such a restraint was upheld, the court says: "Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire a knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade and the promotion of industry."

Similar views are expressed in *Mumford v. Getting*, 7 C. B. (N. S.) 305; 97 E. C. L. R. 303 (1859), as follows: "If the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity, seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business and then transferring their services to a rival trader. It appears to me to be highly important that persons like this defendant should be able to enter into contracts of this sort which will afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice."

The following are additional cases of the same sort in which such covenants were held valid: *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 22 Atl. Rep. 348 (1891); *Carter v. Alling*, 43 Fed. Rep. 208 (1890); *Cheesman v. Nainby*, 2 Ld. Raym. 1456 (1726); *Hitchcock v. Coker*, 6 A. & E. 438; 33 E. C. L. R. 241 (1837); *Sainter v. Ferguson*, 7 C. B. 716; 62 E. C. L. R. 716 (1849); *Nicholls v. Stretton*, 10 A. & E. (N. S.) 346; 59 E. C. L. R. 344 (1847); *Roussillon v. Roussillon*, 14 Ch. Div. 351 (1880); *National Provincial Bank v. Marshall*, 40 Ch. Div. 112 (1888); *Mills v. Dunham*, (1891) 1 Ch. 576; *Badesche Anilin &*

Soda Fabrik v. Schott, (1892) 3 Ch. 447; *Rogers v. Maddocks*, (1892) 3 Ch. 346; *Moenich v. Fenestre*, 61 L. J. Ch. 737 (1892).

The following are cases in which such covenants were held void because unreasonable as between the parties: *Keeler v. Taylor*, 53 Penn. St. 467 (1866); *Herreshoff v. Boutineau*, 17 R. I. 3; 19 Atl. Rep. 712 (1890); *Horner v. Byrne*, 5 M. & W. 547 (1839); *Allsopp v. Wheatcroft*, L. R., 15 Eq. Cas. 59; *Perls v. Saalfeld*, (1892) 1 Ch. 149. See, also, *Mandeville v. Harmon*, 19 N. J. Eq. 185.

20. Contracts by which one agrees to buy of another exclusively, or to sell to another exclusively, or to deal exclusively in a certain make or description of goods.—Such contracts, we believe, are uniformly upheld, so far as the restraining feature is concerned. In all the cases cited below the agreement was held valid. Each case is preceded by a brief statement of the contract involved. Plaintiff, a dentist, agreed to keep himself supplied with mineral teeth purchased of defendant, and the latter agreed not to sell such teeth to any other person in the same place. *Clark v. Crosby*, 37 Vt. 188 (1864). A agreed to furnish B with sewing machines at a discount and on credit, and B agreed to deal exclusively in such machines and buy them of A. *Brown v. Rounsavell*, 78 Ill. 589 (1875). A agreed to manufacture and deliver to B 2,000 barrels of lime at one dollar and twelve cents per barrel, the same to be delivered in equal quantities monthly during specified months, also 2,000 barrels more during the same time if called upon to do so, and was not to sell any lime to anybody else during the continuance of the agreement under a penalty of two dollars per barrel. B agreed to take and pay for the lime. *Schwalm v. Holmes*, 49 Cal. 665 (1875). Plaintiff agreed to sell to defendants and the latter agreed to buy all the oil of peppermint plaintiff should produce for two years, and plaintiff agreed not to sell to others, nor to let others use his land, roots, distillery, etc. *Van Marter v. Babcock*, 23 Barb. 633. An agreement to give the plaintiff the exclusive sale of a certain class of goods in a certain town. *Keith v. Herschberg Optical Co.*, 48 Ark. 138 (1886). Plaintiff agreed to give defendant the exclusive sale of a brand of cigars in Montana and defendant agreed to cease selling other brands and to promote the sale of the brand in question to the best of his ability. *Newell v. Meyendorf*, 9 Mont. 254; 23 Pac. Rep. 333 (1890). Agreement not to sell a certain commodity except to certain persons in four specified cities. *Barber Asphalt Paving Co. v. Brand*, 7 N. Y. Supp. 744 (1889). Agreement by A to sell beer in bulk to B and not to sell it in bulk to any other person in the same place for a year, B agreeing to buy of A one-half of all the beer he handled. *Anheuser-Busch Brewing Assn. v. Houck*, (Tex. Civ. App.) 27 S. W. Rep. 692 (1894). Agreement by defendant, a manufacturer, not to sell furniture in Ottawa, Kansas, except to plaintiffs. *Roller v. Ott*, 14 Kans. 609 (1875). Agreement between a sleeping-car company that the former shall have the exclusive right for fifteen years to furnish drawing-room and sleeping cars for use on the latter's road. *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79; 4 Am. R. R. & Corp. Rep. 213 (1891). It was held that the law would imply an agreement that the car company should provide all the facilities which the proper accommodation of the public required.

Plaintiff assigned to defendant a patent for an improvement upon slubbing machines, and defendant agreed to pay the plaintiff a royalty, and not to sell

any machines without the defendant's improvement attached. *Jones v. Lee*, 1 H. & M. 189 (1856). Plaintiffs and defendant were partners in the business of rope making. They dissolved partnership and entered into an agreement, which, as construed by the court, was in substance as follows: Plaintiffs agreed to allow the defendant two shillings on every hundredweight of cordage made by them on the recommendation of the defendant for his friends or connections whose debts turned out to be good. Defendant agreed to employ the plaintiff exclusively during his life to make all the cordage which should be ordered of him by or for his friends or connections, whom the plaintiffs chose to trust, and that he would not, during his lifetime, carry on the business of a rope maker, or make cordage for any person or persons whatsoever, except the government and public boards, and such of his friends and connections as the plaintiff chose not to trust. *Gale v. Reed*, 8 East, 80 (1806).

It is difficult to see how an agreement to buy of one exclusively, or to deal exclusively in a particular description of goods, can be fraught with any consequences injurious to the public. It is immaterial to the public whether a dealer buys his goods of one person or many; and an agreement by one dealer to handle one description of goods exclusively does not impose any restraint upon other dealers or the producers of other goods of the same general character. But an agreement to sell to one exclusively is a form of contract that may be used to limit the supply of a commodity and create a scarcity. In such case the restraint imposed by the contract may or may not be opposed to public policy according to circumstances. If the object of the contract is to limit the supply of an article it may be prejudicial to the public interests. See *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; *Pacific Factor Co. v. Adler*, 90 Cal. 110; 27 Pac. Rep. 36; *Santa Clara Valley Mill & Lumber Co. v. Hays*, 76 Cal. 387; *Field Cordage Co. v. National Cordage Co.*, 6 Ohio Circ. Ct. 615.

21. Contracts by which one agrees to serve another exclusively or to employ another exclusively.—In *Young v. Timmins*, 1 Tyrwhitt, 226 (1831), it is said that “where one party agrees to employ another in the way of his trade, and the other undertakes to work exclusively for him, that is a particular restraint of trade which may be supported by proof of adequate consideration.” According to the later authorities it would not be necessary to show an *adequate* consideration but only a *good* consideration. See post, § 40. Where A agrees to employ B in his trade at specified wages for seven years, and B agrees to work for A exclusively during that time, the agreement is valid. *Hartley v. Cummings*, 5 C. B. 247; 57 E. C. L. R. 246 (1847); *Pilkington v. Scott*, 15 M. & W. 657 (1846). In such case B is not restrained from pursuing his trade, but, on the contrary, is given the opportunity, and expressly required to pursue it, upon terms which are presumably satisfactory. B is not injured, and trade is not injured, and, consequently, public policy is not violated. But a contract by which B agrees to work for no one but A for a specified time, but A does not agree to find B employment, is unreasonable and void. *Young v. Timmins*, 1 Tyrwhitt, 226 (1831); *Pilkington v. Scott*, 15 M. & W. 657 (1846).

In *Wallis v. Day*, 2 M. & W. 273 (1837), the defendant sold his business of a carrier to the plaintiff and agreed to serve the plaintiff in the business for life

at specified weekly wages. The agreement was sustained. An agreement by defendant to sing at the plaintiff's theater for a specified period and not to sing elsewhere during the same period, was enforced in *Lumley v. Wagner*, 1 DeG., M. & G. 604 (1852). For other similar cases see 1 *Spelling Extraordinary Relief*, § 493.

Plaintiff operated a steam ferry from St. Louis to East St. Louis. The defendant railroad company agreed to give all its ferrying business at that point to the plaintiff, and the latter agreed to provide and maintain wharves and steam ferry boats sufficient to transfer promptly all freight and passengers required. The contract was sustained. *Wiggins Ferry Co. v. Chicago & Alton Co.*, 73 Mo. 389 (1881).

22. Upon a sale or lease of property for the carrying on of a particular business, the vendor may stipulate not to engage in the same business in competition with the vendee or lessee.—In such case there is a good consideration for the contract and there is a good reason for the parties entering into it, and the public is not prejudiced. *Mitchell v. Reynolds*, 1 P. Wms. 181, appears to have been such a case. The defendant assigned to the plaintiff a lease of a bake house in the parish of St. Andrews and agreed not to exercise the trade of a baker within the parish during the term. Whether the defendant was previously engaged in that trade in the leased premises does not appear, nor whether he transferred the good will of any business. The covenant was held valid. In *Hinde v. Gray*, 1 Scott N. R. 123; 1 M. & G. 195, the defendant demised to the plaintiff for ten years a brewery at Sheffield and covenanted that he would not during the term, by himself or otherwise, carry on the trade of brewer or merchant or agent for the sale of ale, beer or porter in Sheffield or elsewhere, or in any manner howsoever be concerned in such trade or business. The covenant was held void as a general restraint of trade, but there seems to be no doubt that it would have been valid if properly limited.

F. CONTRACTS AND RESTRAINTS ENTERED INTO FOR THE PURPOSE, OR WHICH HAVE THE EFFECT, OF DOING AWAY WITH EXISTING COMPETITION.

23. Cases in which a business is bought, not to be continued as an independent business, but to be consolidated or merged in a similar business already carried on by the purchaser, and the vendor is restrained from engaging in the same business in the same territory.—It is manifest that the purpose of such a transaction must be to do away with competition, or at least to diminish it, and such is necessarily the result to some extent at least. In place of two establishments competing for popular favor, the public have only one with which to deal. Nevertheless such contracts have been almost uniformly sustained. In the case of *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 6 South. Rep. 41 (1889), it appeared that Moore, Moore & Handley and the Towers Hardware Company were hardware merchants in Birmingham, Ala. Both dealt in plow stocks and plow blades. The former sold out their stock of these goods to the latter and agreed "not to handle any more plow stocks or plow blades." The restraint was construed to refer to the territory in which the parties had been competing, and the restraint was held to be reasonable

and valid. The following cases were almost precisely similar, and in each of them the restraint was sustained: *Hubbard v. Miller*, 27 Mich. 15 (1873); *Pierce v. Fuller*, 8 Mass. 223 (1811); *Perkins v. Lyman*, 9 Mass. 522 (1813); *Chappel v. Brockway*, 21 Wend. 157 (1839); *Beard v. Dennis*, 6 Ind. 200 (1855); *Johnson v. Gwinn*, 100 Ind. 466 (1884). In the last case the facts were as follows: A, B and C each had a livery stable in Rushville, Ind. C sold out his stock and equipments to A and B and agreed not to start or run a livery stable in the property where he had been carrying it on or permit the property to be used for that purpose during the continuance of his lease, under a penalty of \$2,500 liquidated damages. C committed a breach of the agreement and the suit was for the penalty. It was held that the restraint was valid and that it was not material that the business sold was not to be continued by the purchaser. The court says: "It was not essential to the validity of the restraint that the lease should be transferred, or that the business should be continued by the purchasers in the leased premises, or that there should be a sale of the good will of the business. To hold otherwise would be to place an injurious restriction upon the parties without subserving any interest of the public. The purpose of the purchasers seems to have been to do away with rivalry at a particular stand, and thereby to promote their businesses already established at other places in the same town. Doubtless, the good will of such an establishment would consist largely in the advantages acquired on account of its local position, and to this extent the good will could pass only with the place. What, if any, additional benefit would have passed to the purchasers, or of what privilege, if any, the sellers would have been deprived by an express transfer of the good will, without a continuing of the business at the same stand, we need not determine. That an agreement in partial restraint of trade, in order to be valid, must always be part of a contract by which the good will of a business is sold, is not true, as seems to be supposed by counsel. As a condition to the purchase of the stock used in the business of a rival establishment, it could be agreed validly that the sellers should not use the same building as a livery stable." P. 472.

To the same class also belong the cases of *Ellerman v. Chicago Junction Rys. & Union Stock Yard Co.*, 49 N. J. Eq. 217; 23 Atl. Rep. 287, and *Diamond Match Co. v. Roeber*, 106 N. Y. 473. In the latter case the defendant sold his business of manufacturing and vending matches, which he carried on in New York, to the Swift & Courtney & Beecher Company, a Connecticut corporation, which was engaged in the same business in Connecticut and other states. Nothing appeared in the case to show that the Swift & Courtney & Beecher Company was engaged in an attempt to gain a monopoly of the business of making and selling matches in the United States, and so there was nothing to show that the purchase of the defendant was made, and the restraint by him given, in furtherance of any such scheme. The effect of such an underlying scheme, to which both the vendor and vendee were parties, was not involved in the case.

All that the foregoing cases decide is that it is not essential to the validity of a restraint, entered into in connection with the sale of a business, that the business should be continued by the vendee, as an independent enterprise, or that it should be bought with that intention. In *Diamond Match Co. v. Roeber*,

106 N. Y. 473, 483, it is said, per ANDREWS, J., speaking for the court, that "we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity, if supported by a consideration, will depend upon its reasonableness as between the parties." And in *National Benefit Co. v. Union Hospital Co.*, 47 Minn. 272; 47 N. W. Rep. 806, it is said, in the opinion: "The general concensus of all the authorities, at least the later ones, is that * * * a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same territory; and the question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it is made."

We are aware of no case opposed to the foregoing except that of *Western Wooden Ware Assn. v. Starkey*, 84 Mich. 76; 47 N. W. Rep. 604 (1890). The plaintiff was an Illinois corporation, engaged in the manufacture and sale of pails, tubs and other articles of wooden ware, and was located at Chicago. The defendants carried on the same business at St. Louis, Mich. The plaintiff purchased all the stock, tools, machinery and chattels of the defendants pertaining to their business, and the latter covenanted that for five years they would not engage in the same business in any of the states of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana and Ohio, and that they would not allow the property on which they had been carrying on the business to be used for that purpose or sell it to anyone to be so used. It appeared that the property bought was removed to Chicago, and that the business formerly carried on at St. Louis was discontinued. The defendants afterwards, and within the five years, resumed the business upon the same property, and the plaintiffs filed a bill to enforce the covenant. A demurrer to the bill was sustained, and the court says: "It is not alleged in the bill that in the making of the contract the complainant intended to take the business and good will of Starkey, Ferris and Olmstead, and carry on the business of manufacturing these articles in this state; but, from the terms of the contract, it is manifest that they not only intended to take these parties out of the manufacturing business, but to ship the machinery which was used for that purpose out of the state and close the doors of the shop. Complainant did not purchase the realty. It purchased all the machinery then in use, and the contract shows that it was to be taken down and placed on board the cars. The interests of the parties alone are not the sole considerations involved here. It is the duty of the court to see that the public interests are not in any manner jeopardized. The state has the welfare of all of its citizens in keeping, and the public interest is the pole star to all judicial inquiries. Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is to be removed out of the state. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great northwest teeming with its millions of people. If the complainant could enforce this contract against

Starkey, Ferris and Olmstead and shut the doors of that shop, and prohibit their again opening them for five years in any one of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the state, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years and hold the doors of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor sell it to any one for that business, except by consent of the complainant, and this under a penalty of \$2,000. * * * I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts and held void as unreasonable restraints of trade, and, therefore, void on the ground of public policy."

To what extent the buying up of rival establishments and the taking of restraints from the vendors may go is a question considered in a subsequent note. See *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 534, and *Oakdale Mfg. Co. v. Garst*, post.

24. Buying off competition — restraints entered into for the benefit of the covenantee but not accompanied by any sale of property or business.—In *Leslie v. Lorillard*, 110 N. Y. 519 (1888), the plaintiffs operated a line of steamers between New York and Virginia ports. The defendant put on a line in competition. Thereupon the parties entered into an agreement by which the defendant, for a pecuniary consideration paid by the plaintiff, agreed to discontinue his competition. There was no sale of property or good will. The court held the restraint valid and, in effect, say that the case did not differ from "the simpler case of the sale by an individual of his business and his right to conduct it in a particular part of the land." It was said that competition was not invariably a public benefaction, for it may be carried on to such a degree as to become a general evil. *California Navigation Co. v. Wright*, 6 Cal. 258 (1854), is a similar case. Defendant and the plaintiff's assignor were respectively the owners of boats and engaged, as rivals, in navigating the waters of the state of California. Defendant, for a consideration of \$15,000, agreed that for three years he would not permit any boat in which he was interested to navigate certain specified waters in the state. The court held the restraint to be reasonable and valid. To the objection that it gave the plaintiff a monopoly of the business, it was answered that it only secured the plaintiff against the competition of one man, while all the rest were at liberty to engage in the business. A similar restraint, made under similar circumstances, was sustained in *Palmer v. Stebbins*, 3 Pick. 188 (1825), and the court, per WILDE, J., said: "Whether competition in trade be useful to the trade, or otherwise, will depend on circumstances. I am rather inclined to believe that, in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen or men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens that small discouragements will have no injurious effect in checking in some degree a spirit of competition. An agreement with a tradesman to give him all the promisor's custom or busi-

ness, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another. As to the public, therefore, such a contract *stat indifferenter*. It would be extravagant to suppose that any one, by multiplying contracts of this kind, could obtain a monopoly of any particular trade."

In *Caswell v. Gibbs*, 33 Mich. 831, an agreement by defendants never to tow boats in competition with the plaintiff's was held to be void because without limit of time or space, and it was also held to be too uncertain and indefinite to be specifically enforced. The covenant was made for a valuable consideration but not in connection with the sale of any boats or business. The covenant is very clearly distinguishable from those in question in the preceding cases. In the latter the covenant was not to compete in certain waters or on certain lines of traffic, while in the Michigan case the covenant was not to compete with plaintiffs anywhere or at any time, and was not confined to the protection of the business which the plaintiffs were then carrying on.

If the principle of the foregoing cases is sound, it will apply as well to any other business as to that of carriers. In short, the public are less interested in other businesses, and would be less injured by restraints placed thereon, so that it would follow, that any person engaged in business of any kind might get rid of the competition of a rival tradesman by inducing him, for a pecuniary consideration, to go out of the business and not to engage in it again in the same territory. And this would be only a direct way of accomplishing a result which could, confessedly, be accomplished by buying out the business of the rival dealer, as was done in the cases cited in the last section.

If a person may thus buy off the competition of one rival trader may he, in like manner, buy off the competition of two or more or any number? This question seems to have arisen in but one case, and was not really decided in that. *Chaplin v. Brown Bros.*, 83 Iowa, 156; 48 N. W. Rep. 1074 (1891). All the grocers of a town, eight in number, agreed with plaintiffs that for two years they would not buy butter or take it in trade, and plaintiffs agreed to go into the business and pay as good prices for butter as were paid in another specified town in the same county. The suit was to enjoin one of the grocers from violating the agreement and to recover damages for past breaches. The court held that the agreement was without consideration, and was, therefore, unenforcible because a nudum pactum. It was also claimed in the case that the contract was against public policy as giving plaintiffs a monopoly of the butter trade in the town. Upon this point the court says: "But it appears to us that the decision of the District Court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts

cannot be enforced." The court having made a clear decision that the contract was without consideration, and there being no doubt upon this question, what was said about the contract being against public policy was dictum merely, and would not be binding in any future case. Still the court clearly expresses its opinion that if the plaintiffs had paid a valuable consideration to each one of the contracting parties, the contract would be void as tending to create a monopoly. The question whether an underlying purpose to acquire the practical monopoly of a trade will render void any contract or restraint entered into in pursuance of such purpose will be considered hereafter.

25. Division of territory, business or customers among competitors, each agreeing to confine his operations to a particular district or class of business or customers.—Contracts of this description have been uniformly sustained in their general features, unless the business was of a public nature and the restraint violated a public duty. In *Wickens v. Evans*, 8 *Younge & Jervis*, 318 (1829), it appeared that three trunk and box manufacturers, who had carried on business by means of traveling salesmen and otherwise throughout England, in competition with each other, entered into an agreement by which the country was divided into three specified districts, and one district was allotted to each, and each was to trade only in his own district and not in any way in the other two. It was further agreed that if any new dealer should come in to oppose any one of them they should meet together to devise ways to protect their mutual interests. The defendant, being one of the three parties to the agreement, violated the agreement by traveling in the plaintiff's district, who brought suit for damages. It was held that the agreement was upon good consideration, was a partial restraint only and was valid, that it did not create a monopoly, as all others were free to engage in the business, and that the clause in regard to new dealers coming in did not vitiate the agreement, because it could not be presumed that any unlawful means would be resorted to in protecting their mutual interests. GARROW, B., said: "It has been supposed that the public are interested in precluding the parties from entering into the agreement now in question; but I think it very doubtful whether the benefit of the public would be best consulted by these three persons continuing to travel over the whole country, or by each confining himself to the district marked out in the map."

A similar agreement was upheld in *Stearns v. Barrett*, 1 *Pick.* 443 (1823), and *Richards v. American Desk & Seating Co.*, ante, p. 99, supports the same view. In the former case the plaintiff and defendant, being joint inventors and patentees of certain machines, agreed that the defendant should have the exclusive use and sale thereof in Massachusetts and Rhode Island and the plaintiff elsewhere in the United States. There was a question whether or not the patents were valid, but the court held that even if the patents were void the agreement was good.

In *National Benefit Co. v. Union Hospital Co.*, 47 *Minn.* 272; 47 *N. W. Rep.* 806 (1891), the plaintiff and defendant were both engaged in selling benefit policies in the same territory. They entered into an agreement by which the plaintiff was to solicit policies only of railroad employees, while defendant might solicit of all others, and neither was to invade the other's field. The agreement was sustained. The court says: "Neither one nor both of these companies

have any exclusive right to engage in this business, it being one open to all; hence, this contract does not, and cannot, create any monopoly. The most that can be claimed against it is that it reduces by one the number of competitors. * * * And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good."

In *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Pac. Rep. 581 (1892), an agreement between five powder companies that each should sell only a specified proportion of the aggregate amount sold by all, and should account to the others for the profits on any sales in excess of the amount allowed, was held to be void, as a restraint of trade prohibited by the California Code.

In *Hearn v. Griffin*, 2 Chitty, 407 (1815), an agreement between two rival coach proprietors, to charge the same prices to passengers, arranging for each to run on different days, and binding them not to run in opposition to each other, was held to be valid. Here was a division of custom by means of a division of time, so that each should have the exclusive right of transportation in the period or on the days assigned him. Lord ELLENBOROUGH said that the agreement was "merely a convenient mode of arranging two concerns which might otherwise ruin each other."

In *Collins v. Locke*, L. R., 4 App. Cas. 674 (1879), four stevedores of Melbourne entered into an agreement for the expressed purpose of preventing competition, by which appellant was to be entitled to stevedore all ships that should arrive at Melbourne consigned to a specified firm, the respondent all ships consigned to three other named firms, and the two other parties respectively all ships consigned to other specified firms. It was further agreed, (1) that they would not undertake, or be in any way concerned in, the stevedoring of any ship consigned to any of the firms named, except in accordance with the agreement; (2) that if either of the named firms refused to allow the stevedoring of any ship to be done by the party entitled, but should require any of the other parties to do it, the one doing the job should give an equivalent to the one losing it, of an amount to be fixed by arbitration; (3) that the stevedoring of all ships, not consigned to any of the named firms, should be undertaken by the parties (except respondent) in turn in the order of their arrival. The agreement was held valid in so far as the parcelling out of the business was concerned and the mutual restraints imposed for the protection of each in the part assigned him. But the effect of the agreement was that if a firm not named in the agreement should refuse to employ the one whose turn it was to do the stevedoring, then all the others were debarred from doing the work, and in this respect the agreement was held bad, on the ground that the restraint did not benefit any of the parties, and was detrimental to the public by preventing the employment of any of the three who otherwise might do the work. The court says: "The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lord-

ships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means; that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade." In connection with this case see *Fiebacher v. Bryant*, (La.) 15 South. Rep. 181; also, *Gale v. Read*, 8 East, 80.

But where the business is one which cannot be pursued without a franchise from the government, the grant of such franchise imposes an obligation upon the grantee that cannot be avoided by his entering into any restraints upon his right to carry on the business. Thus, where two gas companies were chartered to furnish gas to a city, it was held that they could not divide the territory of the city between them and agree to operate exclusively in the territory assigned to each. *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396. See, also, § 28, post.

26. Agreements between independent traders to prevent competition, control prices or limit supply, imposing mutual restraints upon the parties.—Restraints of trade in connection with such agreements will be considered in a subsequent note.

G. VALIDITY OF RESTRAINT AS AFFECTED BY THE NATURE OF THE BUSINESS RESTRAINED.

27. The liquor traffic.—It has been held that a contract upon a good consideration by which the obligor is restrained from engaging in the liquor traffic will be held valid regardless of the extent of the restraint, and though the obligee is not engaged in the liquor traffic, and the restraint will be no benefit to the latter in his trade or business. *Harrison v. Lockhart*, 25 Ind. 112 (1865); *Studabaker v. White*, 31 Ind. 211 (1869); *McAllister v. Howell*, 42 Ind. 15 (1873); *Watrous v. Allen*, 57 Mich. 362; 24 N. W. Rep. 104; *Anheuser-Busch Brewing Assn. v. Houck*, (Tex. Civ. App.) 27 S. W. Rep. 692 (1894). In the last case, in speaking of a contract in restraint of trade in beer, the court says: "Is beer one of those articles of consumption, though one in frequent use among the people, the sale of which is not permitted by public policy to be limited by a contract in restraint of trade? We have concluded that it is not. The policy of the laws of the state is not towards the unrestricted or general sale of such article. The liquor traffic has always been kept in restraint by statutes imposing onerous conditions and regulations in reference to its pursuit, clearly evidencing a policy of not allowing every one to engage in the business at will."

The principle is one which would apply to any business that is illegal or immoral, or which it is the policy of the law to prohibit or repress.

28. Business of a public nature or affected with a public interest.—Where a business is carried on under and by virtue of special powers, franchises and privileges, granted by the government for the public use, the grantee is under obligation to fulfill the purposes for which the grant was made, and any restraint upon the business inconsistent with such obligation is void. *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530 (1887); *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409; *Central Trans. Co. v. Pullman Palace Car Co.*, 139 U. S. 24; 4 Am. R. R. & Corp. Rep. 172, 191; *West Va.*

Trans. Co. v. Ohio Riv. Pipe Line Co., 22 W. Va. 600 (1888); State v. Hartford & N. H. R. Co., 29 Conn. 538; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Chicago, M. & St. P. R. Co. v. Wabash, etc., R. Co., (C. C. A.) post; Cleveland, etc., R. Co. v. Clessner, (Ind.) 8 Am. R. R. & Corp. Rep. 686, 695. Consult, also, United States v. Trans.-Missouri Freight Assn., 8 Am. R. R. & Corp. Rep. 523, 543-545. In West Va. Trans. Co. v. Ohio Riv. Pipe Line Co., 22 W. Va. 600, after reviewing cases on restraints of trade, it is said: "From the principles which underlie all the cases, the inference must necessarily be drawn that if there be any sort of business which, from its peculiar character, can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest." P. 625. The court considered that railroad, telegraph and pipe line companies belonged to the class in question. In the Illinois case the principle was applied to gas companies, the court saying: "The ordinary rule, that contracts in partial restraint of trade are not invalid, does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city." P. 545.

So a company engaged in the telephone business cannot lawfully disable itself by contract from treating all the public alike and with impartiality. See cases cited in 8 Am. R. R. & Corp. Rep. 650, 651.

29. The doctrine as to contracts in restraint of trade does not apply to sales of trade secrets and patents, or a business depending thereon.—The public has no right to trade secrets, and it is, therefore, immaterial to the public who uses them. "Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction in such cases, the public gains on the one side what is lost on the other; and unless such a bargain was treated as outside the doctrine of general restraints of trade there could be no sale at all of secret processes of manufacture." BOWEN, L. J., in Maxim-Nordenfeldt case, (1898) 1 Ch. 660. A patent is an exclusive right to trade, conferred by authority of the legislature, and, as the legislature is the final arbiter in matters of public policy, it follows that public policy favors such exclusive rights. Hence, the vendor of a trade secret or patent may enter into any restraint he pleases with respect to the secret or patent without violating public policy. Stearns v. Barrett, 1 Pick. 443; Vickery v. Welch, 19 Pick. 523; Taylor v. Blanchard, 13 Allen, 370; Peabody v. Norfolk, 98 Mass. 452; Morse Twist Drill & Machine Co. v. Morse, 103 Mass. 73; Alcock v. Beusse, 5 Duer, 76; Peck v. Jarvis, 10 Paige, 118; Good v. Deland, 121 N. Y. 1; 24 N. E. Rep. 15; Tode v. Gross, 127 N. Y. 480; 28 N. E. Rep. 469; Kinsman v. Parkhurst, 18 How. 289; Fowle v. Park, 131 U. S. 88; Central Trans. Co. v. Pullman Palace Car Co., 139 U. S. 24, 53; Bryson v. Whitehead, 98 Mass. 452; Leather Cloth Co. v. Lorsont, L. R., 9 Eq. Cas. 345; Hagg v. Darley, 47 L. J. Ch. 567.

But the restraint must not be larger than is necessary for the reasonable protection of the vendee. Thus, in Berlin Machine Works v. Perry, 71 Wis.

495, the defendant sold his interest in a manufacturing plant and business for making and selling sand papering machines, together with patents for such machines, and covenanted that he would not thereafter make, sell or cause to be sold any sand papering machines of any description. The covenant was held to be void because it embraced more territory than was necessary for the protection of the vendee, and also because it prevented the vendor from making and selling sand papering machines of a kind that would not compete with those made by the vendee. To the same effect is *Gamewell Fire Alarm Tel. Co. v. Crane*, ante, p. 78.

An agreement by the vendor of a patent to assign to the vendee all future patents which the vendor may acquire of a like nature to the patent sold is not contrary to public policy. *Printing & Numerical Registering Co. v. Sampson*, L. R., 19 Eq. 462; *Morse Twist Drill & Machine Co. v. Morse*, 108 Mass. 73.

H. MISCELLANEOUS QUESTIONS.

30. Restraints upon the use of property.—It is common upon the sale or lease of property to restrict the use which may be made of the property transferred. Such restrictions are analogous to contracts in restraint of trade as more commonly understood. They must be reasonable and not injurious to the public. In *Hodge v. Sloan*, 107 N. Y. 244 (1887), the plaintiff was engaged in the business of mining and selling sand. He sold a piece of his land to S. who covenanted not to sell any sand off the same. The covenant was held to be valid and binding upon S. and his grantees with notice. The court says: "Many other instances of restraints might be referred to, and where it is of such a nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or of certain kinds of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint." P. 251.

A covenant or condition in a deed that liquor shall not be sold on the premises is valid. *Hatcher v. Andrews*, 5 Bush, 561; *Watrous v. Allen*, 57 Mich. 362; 24 N. W. Rep. 104; *Carter v. Williams*, L. R., 9 Eq. Cas. 678. So of a covenant in a lease that the premises shall not be used as a coffee house, *Fitz v. Iles*, (1898) 1 Ch. 77; or for hotel purposes, *Stines v. Dorman*, 25 Ohio St. 580; *Mollyneaux v. Wittenberg* (Neb.), 58 N. W. Rep. 205; or a covenant restricting the use of property conveyed to dwelling purposes. *Trustees v. Lynch*, 70 N. Y. 440; *Morris v. Tuscaloosa Mfg. Co.*, 83 Ala. 565; 8 South. Rep. 689. But a court of equity will not enforce such a covenant where a change of circumstances has made the covenant unreasonable and oppressive. *Trustees v. Thatcher*, 87 N. Y. 313.

In *Lewis v. Gollner*, 129 N. Y. 227; 29 N. E. Rep. 81 (1891), the plaintiff bought of defendant his contract for a lot in the vicinity of plaintiff's residence, upon which the defendant was proposing to erect flats. As part consideration the defendant agreed verbally not to erect any flats in plaintiff's immediate neighborhood. The restraint was held valid and enforceable. This was in effect a restraint upon the use of any property which the defendant might have or purchase within the designated locality. A restriction in a deed that

the grantee or his assigns should never erect buildings thereon within a certain distance of the street is valid and binding upon the grantee and his assigns. *Muzzarelli v. Halshizer*, (Penn.) 30 Atl. Rep. 291 (1894).

The following are additional authorities in support of such restrictions: *Parker v. Nightingale*, 6 Allen, 341; *Burbank v. Pillsbury*, 48 N. H. 475; *Barrow v. Richard*, 8 Paige, 351; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 37; *Morland v. Cook*, L. R., 6 Eq. Cas. 252; *Brown v. Great Eastern R. Co.*, 2 Q. B. Div. 406; *London, etc., R. Co. v. Comm*, 20 Ch. Div. 562; *Whitman v. Gibson*, 9 Simons, 96; *Western v. McDermott*, L. R., 2 Ch. App. 72; *Wilson v. Hart*, L. R., 2 Ch. App. 463; *Fulk v. Moxhay*, 2 Ph. Ch. 774.

The same rule would apply to the sale of a boat or vessel. Parties operating passenger boats between New York and Albany, sold one of their boats to the defendant, who covenanted that the boat should never be used in the passenger business between those cities. The covenant was held valid. *Dunlop v. Gregory*, 10 N. Y. 241. So of a covenant that a boat should not be used on any of the waters of California, or of the Columbia river and its tributaries. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64. But see *Oregon Steam Navigation Co. v. Hale*, 1 Wash. Ter. 283; and *Wright v. Ryder*, 36 Cal. 342.

We refer to a few cases as illustrating under what circumstances such restrictions will be held void. A covenant in a deed that the land conveyed should not be sold or leased to a Chinaman was held to be against public policy, contrary to the Constitution and to our treaties with China. *Gaudolfo v. Hartman*, 49 Fed. Rep. 181. A covenant by the vendor of real estate that neither he or his assigns would sell any marl from off the premises adjoining the tract conveyed, was held void as a general restraint of trade. A distinction was made between a restriction upon the use of the land and the sale of marl after it had been severed. *Brewer v. Cheesman*, 19 N. J. Eq. 537. See, also, the cases cited in the next two sections.

31. Restraints upon alienation.—Cases of this class are sometimes referred to in discussing questions relating to restraints, and they afford some analogies. Numerous cases on the subject are collected in 6 Am. & Eng. Ency. of Law, 877; 13 id. 794; 18 id. 335. See, also, *Butterfield v. Reed*, 160 Mass. 361; 35 N. E. Rep. 1128; *Pritchard v. Bailey*, 113 N. C. 521; 18 S. E. Rep. 628. The case of *Ford v. Gregson*, 7 Mont. 89, which is often cited in cases relating to restraints of trade and trust combinations, seems to fall under this head. The case is stated in the syllabus as follows: "By the terms of a contract entered into between the several owners of different water rights connected with the working of certain placer-mining land, it was covenanted that each of said owners, under the penalty of ten thousand dollars as agreed and liquidated damages, should not sell his water right, or interest therein, without the written consent of all the parties thereto, and also that, without such written consent, neither should make any sale to or settlement or compromise with certain parties who were then endeavoring to obtain the possession of said water rights, or any other person or persons who might thereafter endeavor to obtain possession of the same. It was also covenanted that each should join with the others in the event of any litigation arising with reference to said water rights. Held, that such a contract was void on two grounds: (1) As being contrary to public policy (particularly so in Montana, where water

is the subject of the same), and as being analogous to contracts in restraint of trade; (2) inasmuch as it imposes a restraint and condition upon compromises or settlements of litigation and disputes."

32. Agreements among stockholders restraining the right of alienating or of voting their stock.— It is not the purpose of the writer to go into this subject in this connection at any length. The agreements referred to are either in restraint of trade or analogous thereto and are properly noticed in this connection. Stockholders may combine for any proper purpose, relating to the corporation, or their interests therein. *Griffith v. Jewett*, 15 Weekly L. B. 419; *Faulds v. Yates*, 57 Ill. 416. Restraints upon the power of alienation of stock are generally held to be against public policy and void. *Moses v. Scott*, 84 Ala. 608; *Fisher v. Bush*, 35 Hun, 641. But see *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. 525. In *Fisher v. Bush* it is said: "The right of alienation is an incident of the property represented by the stock, and any restraint placed thereon by a contract which has no other consideration to uphold it than the mutual promise of the parties is contrary to public policy, and cannot be recognized by the court."

Restraints upon the power of voting stock are mostly in the form of what are called "voting trusts." A certain number of stockholders agree to place their stock in the hands of trustees, to be voted as a unit, as a majority of the trustees may elect, or as shall be determined by some other mode pointed out by the agreement. Such agreements are held to be against public policy and void, so far as they restrain the right of the stockholder to vote as he pleases, and any stockholder may withdraw from the agreement or revoke the same at his pleasure. *Moses v. Scott*, 84 Ala. 608; *Bostwick v. Chapman*, 60 Conn. 576; 24 Atl. Rep. 82; *White v. Thomas Inflatable Fire Co.*, (N. J. Eq., Pitney, V. C.) 28 Atl. Rep. 75; *Vanderbilt v. Bennett*, 19 Abb. N. C. 460; *Fisher v. Bush*, 35 Hun, 641; *Griffith v. Jewett*, 15 Weekly L. B. 419. The subject is very elaborately considered in *Bostwick v. Chapman*, 60 Conn. 576; 24 Atl. Rep. 82, in which the court says: "It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs, saving to himself simply the title, the rights to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation; and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stockholder, to so use such power and means as the law

and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud and the seeking of individual gains at the sacrifice of the general welfare as is possible. This, I take it, is the duty that one stockholder in a corporation owes to his fellow stockholders, and he cannot be allowed to disburden himself of it in this way. He may shirk it, perhaps, by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow stockholders." And see, generally, 1 Beach Priv. Corp. §§ 305-307; *Cone's Executors v. Russell*, 48 N. J. Eq. 208; 21 Atl. Rep. 847; *Faulds v. Yates*, 57 Ill. 416; *Foll's Appeal*, 91 Penn. St. 434; *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. 525.

33. The grant of exclusive rights of way to telegraph companies and the like, or restraints upon alienation to similar companies.—The grant by a railroad company to a telegraph company of the exclusive right of constructing and operating a line of telegraph along its right of way is held to be void as against public policy. *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160 (1880); *Western Union Tel. Co. v. Burlington & S. W. R. Co.*, 8 McCrary, 180; S. C., 11 Fed. Rep. 1; *Western Union Tel. Co. v. American Tel. Co.*, 9 Biss. 72; *Western Union Tel. Co. v. B. & O. Telegraph Co.*, 19 Fed. Rep. 660; *Western Union Tel. Co. v. B. & O. Tel. Co.*, 23 Fed. Rep. 12; *Baltimore & Ohio Tel. Co. v. Western Union Tel. Co.*, 24 Fed. Rep. 318; *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. Rep. 498; *Mercantile Trust Co. v. Atlantic & Pac. R. Co.*, 63 Fed. Rep. 910. And see *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. To the contrary are *Western Union Tel. Co. v. A. & P. Tel. Co.*, 7 Biss. 367; *Canadian Pac. R. Co. v. Western Union Tel. Co.*, 17 Can. Sup. Ct. 151.

In the Georgia case it is said: "It is well known that rapid inter-communication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers, merchants, buyers, sellers, all are brought in close proximity, and daily intelligence is given of the world's transactions. Trade is encouraged, industrial enterprise stimulated, and business in all its various branches builds itself upon knowledge. In war the rapid communication of intelligence is almost incalculable; in peace it is scarcely less so. Shall means, then, by which it is transmitted be monopolized by a contract between two artificial beings, invisible, intangible, and existing only in contemplation of law? When such exclusive rights exist, or such monopolies are established, the same should be done by a legislative grant and not by an individual contract. Our judgment, therefore, is that these contracts are especially made and entered into to cripple and prevent competition, and that they thereby enable the plaintiff in error to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law; they are against the public policy, because they tend to create monopolies and are in general restraint of trade."

In *Western Union Tel. Co. v. Chicago & Paducah R. Co.*, 86 Ill. 246 (1877), a contract was made between a railroad company and a telegraph company by which the former agreed to furnish and erect poles and string wires for a line of telegraph on its highway and to keep the same in repair, and the telegraph company agreed to furnish the wire and all other material and apparatus, and the railroad company agreed to give the telegraph company, so far as it legally could, the exclusive right to have and operate a telegraph on its right of way. It was held that the latter provision of the agreement was valid and effectual to the extent of securing to the telegraph company the exclusive use of the poles so erected, but whether it would be effectual to exclude other companies from the right of way was not decided.

The grant to a pipe line company of an exclusive right of way for a pipe line through a 2,000 acre tract of land was, so far as the exclusive right was concerned, held void as against public policy in *W. Va. Trans. Co. v. Ohio Riv. Pipe Line Co.*, 22 W. Va. 600. The court says: "This business of transporting oil in tubes is, like railroad and telegraphing, a business recognized by our statute law as one in which the public has so great and direct an interest that to promote it the statute authorizes the state's right of eminent domain to be exercised by any corporation to acquire a right of way for its tubing through any parcel of land in the state. And from what has been said it must follow that no person can lawfully contract with any corporation for an *exclusive* right of way for tubing through his land, whereby oil is to be transported. For, if he could, he would thereby defeat the state's right of eminent domain." Pp. 630, 631. See cases cited in last two sections.

It is difficult to see how any such contract, if valid, could prevent the exercise of the power of eminent domain to condemn a right of way for a like purpose through the land affected thereby. The existence of valid contracts in respect to land cannot prevent the taking of the whole or any part thereof for public use. The land may be taken and all rights and interests therein, however created and whatever they may be. The right to interfere with an exclusive franchise or privilege may be condemned, upon making just compensation. *Lewis Em. Dom.* § 137. But it is conceivable that an exclusive right to construct and operate a telegraph upon a railroad right of way, or an exclusive right of way through a tract of land for the conveying of persons, freight or intelligence, might be exceedingly valuable to the first grantee, and so, if valid, might practically prevent the construction of any competing line. Contracts, or restraints, of the sort under consideration, do, therefore, have a tendency to prejudice the public by preventing competition in a business impressed with a public interest.

84. By-laws in restraint of trade.—The by-laws of a corporation to be valid must not be repugnant to the law of the land, and must be reasonable. 1 *Beach Priv. Corp.* §§ 812, 818; 1 *Mor. Corp.* § 492. The law of the land is opposed to restraints of trade which are injurious to the public. By-laws, therefore, which restrain trade in a way to be injurious to the public are void. 1 *Beach Priv. Corp.* §§ 814, 815; 1 *Mor. Corp.* § 495. Doubtless the tests of validity would be the same in the case of by-laws as in the case of contracts. A by-law is, in effect, but an agreement between the associates forming the corporation. As in the case of contracts the public can only be injured through

the effect of the by-law upon the parties and through its effect upon trade. Accordingly, if it is *reasonable* as between the members, and produces no *unreasonable* injury to trade, then it is valid. In the time of James I, an incorporated society of the tailors of Ipswich made a by-law that no person should exercise the trade of a tailor in the town till he had presented himself to the master and wardens of the said society, or some three of them, and should prove that he had served seven years, at the least, as an apprentice, and should be admitted by them to be a sufficient workman. The by-law was held to be bad as a restraint of trade for the following reasons: "Forasmuch as the statute has not restrained him who has served as an apprentice for seven years from exercising the trade of a tailor, the said ordinance cannot prohibit him from exercising his trade, till he has presented himself before them, or till they allow him to be a workman; for these are against the liberty and freedom of the subject, and are a means of extortion in drawing money from them, either by delay or some other subtle device, or of oppression of young tradesmen by the old and rich of the same trade, not permitting them to work in their trade freely; and all this is against the common law and the commonwealth; but ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery." *Master, Wardens, etc., of Tailors of Ipswich v. Sheninge*, 11 Coke, 53a (1615). There are many early English cases upon this subject, among which we cite the following: *Freemantle v. The Company of Silk Throwsters*, 1 Lev. 229; *Guddon v. Eastwich*, Salk. 198; *Gunmakers of London v. Fell, Willes*, 384 (1742); *Green v. Mayor of Durham*, 1 Burr. 127 (1757); *Rex v. The Company of Surgeons of London*, 2 Burr. 892 (1759); *Harrison v. Godman*, 1 Burr. 12 (1756); *Rex v. Harrison*, 3 Burr. 1322 (1762); *Pierce v. Bartrum*, Cowp. 269; *Wannel v. Chamberlain of London*, 1 Strange, 675; *Butchers' Company v. Morey*, 1 H. Bl. 370 (1790); *Bosworth v. Hearne*, 2 Strange, 1085; *King v. Wardens of the Coopers' Company*, 7 T. R. 543 (1798). All these cases tend to support the view that by-laws affecting trade depend for their validity upon their *reasonableness* as a regulation of trade. "It is for the advantage and not the detriment of trade that proper regulations should be made in it." *Gunmakers of London v. Fell, Willes*, 384. See, also, *Mitchell v. Reynolds*, 1 P. Wms. 181.

There are a number of cases in this country involving the validity of by-laws alleged to be in restraint of trade, and although the courts are not always in harmony as to what constitutes an unlawful restraint of trade, yet they all determine the question upon the same general principles as apply to contracts. *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1, 7; *People ex rel. v. New York Benevolent Society of Operative Masons*, 3 Hun, 361; *Thomas v. Mutual Protective Assn.*, 49 Hun, 171; S. C., 121 N. Y. 45; *Sayre v. Association*, 1 Duvall, 146; *Huston v. Reutlinger*, 91 Ky. 333; 15 S. W. Rep. 867; *Matthews v. Associated Press of New York*, 136 N. Y. 333; 33 N. E. Rep. 961. The subject is considered quite at length in each of the last two cases. In the New York case the defendant was incorporated for the purpose, among other things, of collecting and supplying news to its members. It had a by-law as follows: "No member of this association shall receive or publish the regular news dispatches of any other news association covering a like territory, and organized for a like purpose, with this association." The plain-

tiffs were members of the defendant association and, while the by-law was in force, also became members of a similar organization, called the United Press Association and published its dispatches. Thereupon the defendant proposed to suspend the plaintiffs for a violation of the by-law and the plaintiffs sued to enjoin such action. Among other things, it was claimed that the by-law was an unlawful restraint of trade, but the court held otherwise. The test of reasonableness was applied and the court concludes thus: "A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business, and must give up all such business as he had theretofore done. Such an agreement would not be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done. It seems to me this by-law is a natural and reasonable restraint upon the members of the association, appropriately regulating their contract as members thereof with respect to the business which the association was specially organized and incorporated to transact. Its success must greatly depend upon the number of its members, and that, in its turn, must greatly depend upon the efficiency, reliability and promptness with which it collects and distributes its news. This by-law, I think, plainly tends to aid the association in the accomplishment of this object."

35. Reasonableness a question of law.—It is impliedly held in all the cases that the reasonableness of a contract in restraint of trade is a question of law to be decided by the court, for it is always so decided. The point is expressly held in the following cases: *Richards v. American Desk & Seating Co.*, ante, p. 99; *Lawrence v. Kidder*, 10 Barb. 641; *Carter v. Alling*, 43 Fed. Rep. 208; *Mallan v. May*, 11 M. & W. 652; *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1898) 1 Ch. 630, 673; 29 Cent. L. J. 309.

36. As to the duration of the restraint.—All the authorities agree that a restraint is not invalid because unlimited in time. *Cook v. Johnson*, 47 Conn. 175; *Goodman v. Henderson*, 58 Ga. 567; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Beard v. Dennis*, 6 Ind. 200; *Martin v. Murphy*, 129 Ind. 464; 28 N. E. Rep. 1118; *Grieraud v. Daudelet*, 32 Md. 561; *Richardson v. Peacock*, 26 N. J. Eq. 40; 28 N. J. Eq. 151; 33 N. J. Eq. 597; *Carl v. Snyder*, (N. J. Eq.) 26 Atl. Rep. 977; *Mackinnon Pen. Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *French v. Parker*, 16 R. I. 219; 14 Atl. Rep. 870; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Archer v. Marsh*, 6 A. & E. 959; 33 E. C. L. R. 498; *Hitchcock v. Coker*, 6 A. & E. 488; 33 E. C. L. R. 241, *Tallis v. Tallis*, 1 El. & Bl. 391; 72 E. C. L. R. 390; *Badische Anilin & Soda Fabrik v. Schott*, (1892) 8 Ch. 447; *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1898) 1 Ch. 630. The point was especially noticed in the above cases, but there are many others in which covenants unlimited as to time have been sustained. The only opposing authority is the decision of the vice-chancellor in *Mandeville v. Harmon*, 19 N. J. Eq. 185, which, however, must be considered as overruled by the later New Jersey cases above cited.

The reason for the general rule is thus given by TINDALL, Ch. J., in *Hitchcock v. Coker*, 6 A. & E. 488; 33 E. C. L. R. 241 (1887): "The good will of a trade is a subject of value and price. It may be sold, bequeathed or become

assets in the hands of the personal representative of the trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be by making the restriction of the servant's setting up or entering into the trade or business within the given limit coextensive with the servant's life.

In *French v. Parker*, 16 R. I. 219; 14 Atl. Rep. 870 (1888), it is said that the rule applies equally to a professional business. The court says: "This reason is as valid in case of a profession as of a trade, for whether, technically speaking, there be any good will attending a profession or not, the professional practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice and sell it, he could probably sell it for more, if he could secure the purchaser from competition with the defendant forever, than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could, for the same reason, make better terms with him. It seems to us that the real principle of decision in *Hitchcock v. Coker* was this, that if the contract be otherwise valid it will not be held to be invalid simply because the restraint may continue beyond the life of the party for whose benefit it is accorded, if for any reason it may be beneficial to him to have it so continue." P. 221.

A covenant which is too great in extent is not rendered valid by being limited as to time, nor is a limit of time alone sufficient to convert a general restraint into a partial restraint. *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630; *Ward v. Byrne*, 5 M. & W. 548, 562; *Proctor v. Sargent*, 2 M. & G. 33; *Gueraud v. Daudelet*, 82 Md. 561. "When a general restraint, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a total restriction on trade, limited only as to time." Baron PARKE in *Ward v. Byrne*, 5 M. & W. 548, 562. "A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade." BOWEN, L. J., in *Maxim-Nordenfeldt case*, (1893) 1 Ch. 630, 652.

A restraint is divisible in respect of time and, if it runs longer than can possibly be of benefit to the covenantor, it will be good for the period required for his protection and bad for the remainder. Thus where A sold a boat to B, and the latter covenanted that it should not be used in certain waters for ten years, and three years later B sold the boat to C, and took from him a like covenant that the boat should not be used upon the said waters for ten years from the last sale, and B was not engaged in navigating the said waters with other boats, it was held that, as C's covenant could be of no possible benefit to B except to protect the latter's covenant with A, the covenant was good only for the time that B's covenant had to run and was void for the remainder of the ten years. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64. See, also, cases cited in next section.

37. Construction of agreements in restraint of trade — divisibility.— In *Roller v. Ott*, 14 Kans. 609, it is said: "All contracts of this kind are to some extent against public policy, and hence their provisions should not be extended by construction or implication so as to favor parties desiring to enforce them beyond what their terms would most clearly require. They are not any where to be looked upon with favor. And when a party desires to enforce one of them, he must simply take what he has in the clearest terms got." P. 616. See, also, *Bowers v. Whittle*, 63 N. H. 47. This, however, does not accord with the weight of authority, and the better rule is that where there is a valuable consideration and the circumstances show that some restraint would be reasonable, the courts will adopt a liberal construction with a view to sustaining the contract. The following are conspicuous instances of this kind: *Moore & Handly Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 6 South. Rep. 41; *Hubbard v. Miller*, 27 Mich. 15; *Angier v. Webber*, 14 Allen, 211; *Warfield v. Booth*, 83 Md. 63; *Sternberg v. O'Brien*, 48 N. J. Eq. 370; 23 Atl. Rep. 848; *Mills v. Dunham*, (1891) 1 Ch. 576; *Barnes v. Geary*, 85 Ch. Div. 154; *Nicholls v. Stretton*, 10 Q. B. 346. In the first of these cases it is said: "The meaning of a contract of this character, however, is not to be found solely from a consideration of its terms. Courts look to all the circumstances surrounding the parties, and attendant upon the transaction, and from a consideration of these circumstances, in connection with the expressions of the undertaking, they will first construe the contract, and then proceed to pass upon its reasonableness as thus construed."

Where the covenant is capable of being separated into parts, some of which are valid and others void, the contract will be divided and the valid parts sustained and enforced. Thus a covenant not to engage in a certain business in a specified city or county, or elsewhere in the United States, may be enforced as to the city or county though unreasonable as to the United States. *Dean v. Emerson*, 102 Mass. 480; *Peltz v. Eichele*, 62 Mo. 171; *Lange v. Werke*, 2 Ohio St. 519; *Thomas v. Miles' Admr.*, 3 Ohio St. 274; *Smith's Appeal*, 113 Penn. St. 579. A covenant not to be interested in selling beer, ale, porter or other fermented liquors, aerated waters, etc., is separable into distinct covenants as to each article named, and may be sustained as to some though unnecessary and void as to others. *Rogers v. Maddocks*, (1892) 3 Ch. 346. An agreement by an employee that, after the termination of the service, he will not deal with "any customers served or belonging at any time" to the

employer, is divisible into a covenant as to those who were customers during the employment and a covenant as to those who became such afterwards. *Baines v. Geary*, 85 Ch. Div. 154. To same effect *Nicholls v. Stretton*, 10 Q. B. 346.

The following are further illustrations of the divisibility of such covenants: *Presbury v. Fisher*, 18 Mo. 50; *Mallan v. May*, 11 M. & W. 652; *Green v. Price*, 13 M. & W. 694; *S. C.*, 16 M. & W. 846; *Cheesman v. Nainby*, 2 Ld. Raym. 1456; *Ward v. Benson*, 2 Crömp. & Jer. 94; *Nicholls v. Stretton*, 10 A. & E. (N. S.) 346; 59 E. C. L. R. 344; *Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, (1893) 1 Ch. 630. The only opposing authority is *More v. Bonnet*, 40 Cal. 251 (1870). In that case a covenant not to engage in a certain business in the city and county of San Francisco, or state of California, was held to be entire and void in toto because it was unreasonable as to the state.

A covenant is always divisible in time, so that, if for any reason it is greater in duration than is reasonable, it may be enforced for such time as is reasonable, and held void as to the remainder. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Brown v. Kling*, (Cal.) 35 Pac. Rep. 995; *Baines v. Geary*, 85 Ch. Div. 154; *Nicholls v. Stretton*, 10 Q. B. 346; *Moenich v. Fenestre*, 61 L. J. Ch. 787.

In *Mills v. Dunham*, (1891) 1 Ch. 576, 580, CHITTY, J., says "that where there is a question of severing the good from the bad part of a covenant or agreement of this kind, the court must find in the agreement itself sufficient ground for making the severance; the court must take great care not to create a new agreement for the parties, nor carve out of an unreasonable agreement something which would be reasonable, for the sake of upholding what would be otherwise void."

In *Bishop v. Palmer*, 146 Mass. 469, a distinction is made between a suit brought to enforce a restraint, part of which is valid and part void, and a suit to enforce a promise made in consideration of such a restraint. The plaintiff was engaged in the business of manufacturing and selling bedquilts and comfortables and in buying, selling and dealing in cotton waste. He sold to the defendants his plant and business of manufacturing and selling bedquilts and comfortables and that portion of his cotton waste business transacted or done in Fall River, and agreed, (1) that for five years he would not in any manner engage in the business of manufacturing and selling bedquilts or comfortables, or in any business of which that formed a part; (2) that he would not for the same period engage in the cotton waste business in Fall River, and (3) that he would not buy of any person the waste produced by certain specified mills. The defendants agreed to pay the plaintiff the sum of \$5,000 in ten equal monthly installments. The suit was for installments of the purchase money. The court held the first clause of the restraint void, as a general restraint of trade, that this vitiated the entire consideration for the promise to pay and that no recovery could be had. It was conceded that the restraint could be enforced against the plaintiff, except as to the first part. Upon this point the court says: "The plaintiff further suggests that if the defendants were to sue him on his contract, they could clearly, so far as the question of legality is concerned, maintain an action upon

all its parts, except, possibly, the single covenant in question. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call upon him to perform all of his agreements, except such as are unlawful. In such case they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground; and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff by reason of what they may have received under the contract." To the same effect is *Saratoga County Bank v. King*, 44 N. Y. 87. See, also, *Arnot v. Coal Co.*, 68 N. Y. 558.

38. Whether a void restraint is also illegal.—In *Bishop v. Palmer*, 146 Mass. 469, 474, the view is expressed that a void restraint of trade is attended by the same consequences as though it was prohibited by statute. The facts of the case are stated in the last section. The question was whether a promise to pay one entire sum in consideration of a sale of property and good will, and also of restraints, one of which was void and the others valid, was rendered void in toto by reason of the void restraint. Upon this point the court said: "As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral or unlawful, and there has been no apportionment made, or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing malum in se, and which is simply a promise not enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is, therefore, deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. *Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law and are held to be illegal.*"

A different view is expressed in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598. In that case the plaintiffs sued the defendants for damages resulting from what was claimed to be an unlawful combination or conspiracy to injure the plaintiffs. Among other things, it was urged that the combination effected an unlawful restraint of trade, and that, therefore, the conspiracy was to do an unlawful act and was actionable. BOWEN, L. J., says: "Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. * * * No action at common law will lie, or ever has lain, against any individual or individuals for entering into a contract merely because it is in restraint of trade." And FRY, L. J., said: "If every agreement in restraint of trade were not only void, but unlawful in the stricter sense of the word, it would follow that, as every agreement must

be between at least two persons, every such agreement would constitute an indictable offense, and yet not a single case has been cited of a conspiracy constituted by a mere agreement between two persons in undue restraint of the trade of one of the contractors. This silence of the books is very significant." P. 627.

39. The consideration for the contract.—In the *Maxim-Nordenfeldt* case, (1898) 1 Ch. 630, BOWEN, L. J., says that originally and down to 1837 the law was that to sustain a contract in restraint of trade it was necessary to show that it had an adequate consideration, and he refers to the following cases as holding that view: *Mitchell v. Reynolds*, 1 P. Wms. 181 (1711); *Cheesman v. Nainby*, 2 Ld. Raym. 1456 (1726); *Clerke v. Comer*, Cas. t. Hardw. 53 (1734); *Davis v. Mason*, 5 T. R. 118 (1798); *Bunn v. Gay*, 4 East, 190 (1803); *Young v. Timmins*, 1 Tyrw. 226 (1831). But he says that the present doctrine is that the court will not inquire as to the adequacy of the consideration, and that it is only necessary that such contracts should have a good or valuable consideration as in case of other contracts, referring to the following cases: *Hitchcock v. Coker*, 6 A. & E. 438 (1837); *Wallis v. Day*, 2 M. & W. 273 (1837); *Leighton v. Wales*, 3 M. & W. 545 (1838); *Archer v. Marsh*, 6 A. & E. 919 (1837); *Tallis v. Tallis*, 1 El. & Bl. 391 (1858).

There is certainly no question at the present day but what contracts in restraint of trade stand upon the same footing as other contracts in respect of consideration. *Beard v. Dennis*, 6 Ind. 200 (1855); *Gueraud v. Daudalet*, 82 Md. 561 (1870); *McClurg's Appeal*, 58 Penn. St. 51 (1868); *Granly v. Barnard*, L. R., 18 Eq. 518.

40. A pecuniary or valuable consideration alone will not support a restraint however limited.—This is implied in all the cases which hold that the restraint must be reasonable; that is, such as is necessary for the protection of the covenantee and not injurious to trade. The point is expressly noticed in the following cases: *Harrison v. Lockhart*, 25 Ind. 112; *Ross v. Sudgbeer*, 21 Wend. 166; *Chappel v. Brockway*, 21 Wend. 157; *Hubbard v. Miller*, 27 Mich. 15. In the last case it is said: "If A, who is not engaged in the business of keeping a public house, or a drygoods store, or a saddler's shop, and does not contemplate entering upon or being interested in such business, goes to B, who is engaged, or preparing and about to engage, in such business, and takes a contract from B not to continue or engage in such business in a particular city or village or other territory, defined or undefined, such a restriction would be void, whatever pecuniary consideration might be paid for it. A can have no legal interest in, and can derive no benefit from, such a restraint, and has no legal interest in its observance; and it would be imposing a restriction upon B which might be burdensome to him without any corresponding benefit." P. 20.

So in *Chappel v. Brockway*, 21 Wend. 157, the court says: "A man cannot for money alone, where he has no other interest in the matter, purchase a valid contract in restraint of trade, however limited may be the circle of its operation." P. 162. "Whatever may be the pecuniary consideration it must appear, in addition, that there was some good reason for entering into the contract, and that it imposes no restraint upon one party which is not beneficial to the other." P. 160.

41. Whether contracts in restraint of trade are presumptively bad.—The law upon this point, as laid down by Chief Justice PARKER in *Mitchell v. Reynolds*, 1 P. Wms. 181, is as follows: "In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." The same rule has been held in numerous cases. "Contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law." TINDALL, Ch. J., in *Horner v. Graves*, 7 Bing. 735, 744 (1831). "A contract in restraint of trade is always void if nothing more appears." *Field Cordage Co. v. National Cordage Co.*, 6 Ohio Circ. Ct. 615, 621. "The law starts with the presumption that the contract is void; and it is only by showing that there was an adequate consideration or good reason for entering into it that the presumption can be destroyed. The rule is, not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackles upon one party which is not beneficial to the other. The facts which prove the restraint reasonable must in some way be made to appear; and as the presumption is against the party setting up the contract, it lies in him to remove the difficulty." *Ross v. Sadgbeer*, 21 Wend. 166 (1839). "All contracts restraining the industrial or business freedom of a person are presumed to be void, and the onus lies upon those claiming to enforce them to prove their reasonableness." *Greenhood Pub. Pol.* 720. To the same effect: *Pierce v. Fuller*, 8 Mass. 223 (1811); *Mallan v. May*, 11 M. & W. 652 (1843); *Kellogg v. Larkin*, 3 Pinney (Wis.), 123; 3 Chand. 183 (1851); *Berlin Machine Works v. Perry*, 71 Wis. 495 (1888); *Lange v. Werke*, 2 Ohio St. 519 (1853); *Sainter v. Ferguson*, 7 C. B. 716; 62 E. C. L. R. 716 (1849).

In *Hubbard v. Miller*, 27 Mich. 15 (1878), the Supreme Court of Michigan gives an elaborate review of the doctrine as follows: "It has sometimes been said by text writers, and even by courts, that all contracts in restraint of trade, when general or limited, are prima facie void, or that they are to be presumed void, until it be shown, not only that there was an adequate consideration, but that the circumstances under which the contract was made were such as to render the restraint reasonable. But the rule to be drawn from a careful analysis of the adjudged cases and the reasons upon which they are founded, does not seem to us to involve any such presumption in the accurate or legal sense of the term, and may be more correctly stated to be, that all contracts in restraint of trade are void, if considered only in the abstract, and without reference to the situation or objects of the parties or other circumstances under or with reference to which they were made; and this, though the pecuniary consideration paid may have been sufficient to support the contract in any other aspect, or any ordinary contract for a legal purpose; or even though it may be sufficient in value to compensate the restraint imposed. If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose

favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid. Whether it can be supported or not, depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration; it will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect upon the public; in short, upon all the surrounding circumstances." It will be found upon examination that this is the same thing in substance as the succinct statement of Chief Justice PARKER, above quoted.

In *Mills v. Dunham*, (1891) 1 Ch. 576, LINDLEY, L. J., says: "I think that Mr. Levitt's contention, that you are to treat a restraint of trade as *prima facie* bad, and throw upon the person supporting it the onus of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents." His conclusion is that you are not "to approach the contract with a leaning either way," and LOPES, L. J., says: "An agreement of this kind must be construed like any other agreement — that is, you must without any bias on one side or the other extract the intention of the parties from their words." KAY, L. J., in the same case, referring to such contracts, says: "They ought not then to be construed with a bias as being *prima facie* illegal, but construed fairly."

To say that contracts in restraint of trade are *prima facie* or *presumptively* bad, is not strictly accurate, for that would require that the court should in all cases approach such contracts with a bias, and would place upon all such contracts a presumption to be overcome. The general rule is that contracts in restraint of trade are against public policy, *unless they appear to be reasonable*. Unless the court can see that they are reasonable it must pronounce them void. Therefore, if the restraint appears *and nothing more*, they are void in the eye of the law, not because the law presumes them bad, but because there is nothing to show them reasonable. But if any circumstances appear which may tend to show them reasonable, then the court must judge of these circumstances without prejudice or favor. The onus does rest upon the party who would take the benefit of such a contract, of showing that it is reasonable. He is in the position of the plaintiff in a civil suit. There is no presumption for or against the plaintiff in such a case; still the burden rests upon him to make out his case. See especially the principal case.

42. If the contract is valid when made a change of circumstances does not render it invalid.—This is held in *Cooke v. Johnson*, 47 Conn. 175, and *Rannie v. Irvine*, 7 M. & G. 969, and is in accordance with the general law of contracts. But see *Trustees v. Thatcher*, 87 N. Y. 313.

43. The benefit of a covenant in restraint of trade may be assigned.—This is expressly held in the following cases, and is implied in various others, wherein the covenant was enforced in favor of assignees of the covenantee: *Cal. Nav. Co. v. Wright*, 6 Cal. 258; *Hedge v. Lowe*, 47 Iowa, 137; *Gueraud v. Daudelet*, 32 Md. 561; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Francisco v. Smith*, (N. Y.) 38 N. E. Rep. 980; *Morgan v. Perhamus*, 36 Ohio St. 517; *Berlin Machine Works v. Perry*, 71 Wis. 495; *Barnes v. Geary*, 35 Ch. Div. 154; *Benwell v. Inns*, 24 Beav. 307.

CHICAGO, M. & ST. P. RY. CO. v. WABASH, ST. L. & P. RY. CO.

(United States Circuit Court of Appeals, Eighth Circuit, May 7, 1894.)

1. RAILROAD COMPANIES. POOLING CONTRACTS. VALIDITY. An agreement between railroad companies, by the terms of which all their roads are to be operated, as to through traffic, as if "operated by one corporation which owned all of them," and which provides for an actual division of such traffic, and, where this is not done, for a division of the gross earnings thereof, the obvious purpose being to suppress or limit competition, and to establish rates without regard to their reasonableness, is contrary to public policy, and void.

2. PERFORMANCE BY ONE PARTY WILL NOT ENABLE HIM TO ENFORCE INVALID CONTRACT AGAINST OTHER PARTY. One party to such illegal agreement, claiming to have performed its part thereof, cannot maintain a suit to enforce division of earnings by another party thereto, the traffic not having been divided. Courts will not lend their aid to enforce performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight in which their own illegal action has placed them.

THIS was a suit by the Central Trust Company of New York against the Wabash, St. Louis and Pacific Railway Company and others to foreclose a mortgage on the property of the railway company. The Chicago, Milwaukee and St. Paul Railway Company filed an intervening petition for a claim under certain traffic contracts. Defendant railway company answered, and, on hearing, the petition was dismissed. The intervener appealed.

On December 5 and December 29, 1883, contracts providing, among other things, for a pooling and division of competitive traffic, were entered into by and between seven railroad companies, to wit, the Union Pacific, the Chicago, Rock Island and Pacific, the Chicago, Milwaukee and St. Paul, the Wabash, St. Louis and Pacific, the Chicago and Northwestern, the Chicago, St. Paul, Minneapolis and Omaha, and the Missouri Pacific. There were four contracts. The first was between the Union Pacific Railway Company, as party of the first part, and the Chicago, Rock Island and Pacific Railway Company, as party of the second part, and the Chicago, Milwaukee and St. Paul Railway Company, as party of the third part. The other three contracts admitted the other parties into the pool, and made some modifications and extensions of the original contract. The four

contracts were in effect one, and will be so treated. Some of the material provisions of the contract are set forth in the margin.*

The pooling and division of traffic intended by the contracts were to be accomplished, so far as might be, by physical division of the traffic itself, between the companies, in certain fixed proportions; and, where this was not or could not be done, it was to

*The preamble declares the object of the contract to be to "make the railway system of the party of the first part substantially a part of the railway system of each of the other parties hereto, as to westward-bound traffic which will pass through Council Bluffs, in the state of Iowa, and each of the railway systems of the other parties substantially a part of the system of the party of the first part as to the east-bound traffic which will pass through the same place. * * * It is declared to be the purpose of the parties hereto by the execution of these articles, and the performance of the several covenants, promises and agreements herein set out, to establish and operate through lines of railway, which shall connect, when the same can be done by a reasonably direct line through Council Bluffs, all points on the system of the party of the first part with all points on the several systems of the other parties (excepting the Kansas Division of the party of the first part and its railroads in the state of Kansas), including all extensions of the main lines, branches, and other railways mentioned in the preamble hereto, and all lines and branches which are now owned, controlled or operated by either of the parties hereto in connection with any of its railways above mentioned, and which may be added thereto by construction, purchase, lease or otherwise, and to secure the operation of all of said lines as to such through traffic as they should be if operated by one corporation which owned all of them. * * *

"The party of the first part covenants, promises and agrees with each and both of the other parties that it will, so far as it lawfully can, deliver to the railways of said other parties, at Council Bluffs, all eastward-bound through traffic which may be received by it for transportation to any point which can be reached with reasonable directness over any of the through lines composed of the railroads of two or more of the parties hereto passing through Council Bluffs, and that it will make all lawful and reasonable efforts to secure the transportation of all such through traffic which may be received by it for transportation over such through lines. It will divide all competitive through traffic which shall be transferred from its own railways to those of the other parties, as nearly as shall be practicable, into two equal parts, and transfer one of said parts to the railways of each of said parties for transportation to destination, or to the proper connecting line. * * *

"The rates which shall be charged for the transportation of through traffic over the through lines hereby established, for which provision has not been made in the preceding section, shall be fixed in the manner following: The established or current rate of the party of the first part, as per schedules hereto attached and made a part hereof, between the point at which traffic is received or to which it is destined and Council Bluffs, shall be added to the established or current rates of the parties of the second and third parts, as per

be accomplished by pooling and division of the gross earnings of such traffic between the companies in such fixed proportions. The contract was to continue for twenty-five years.

In May, 1884, Solon Humphreys and Thomas E. Tutt were appointed receivers of the property, rights and franchises of the

schedules hereto attached and made a part hereof, between the points on their several lines at which such traffic is received or to which it is destined and Council Bluffs, and the sum of the two rates shall be the through rate; provided, however, that the rates upon all through traffic between competitive points which may be connected by a through line over the Northern Pacific railroad shall be so adjusted that the rates between such points and all Chicago and Mississippi river points by way of Council Bluffs shall be as low as by way of St. Paul. * * *

“The through rates on east-bound through traffic over the lines hereby established may be reduced by the party of the first part, and the like rates on like traffic west bound may be reduced by the party of the second or third part, by whom it shall be delivered to the party of the first part, when such reduction shall be rendered necessary by competition with lines other than those hereby established. When any through rate is reduced by a party for any reason, it shall immediately notify the other parties hereto of such reduction and the facts which it is claimed justified such reduction. A reduction of a rate shall continue only so long as shall be necessary because of competition. No rate shall be reduced by any party otherwise than is provided in this and preceding sections. * * *

“If any through rate shall be reduced by any party for reasons which are not satisfactory to the other parties, the rates fixed by the schedule shall be immediately restored, and maintained until a majority shall direct a modification, and all traffic transported under modified rate shall be accounted for at full rates in the division of the proceeds of the through traffic between the parties. In no case shall a schedule of rates be in any manner modified, altered or reduced for the purpose of drawing traffic from the railways of any party hereto. If any party shall feel aggrieved because of any modification of any through rate, or of any order restoring a rate which has been cut, or by the action of any party tending to evade or in any wise impair agreed rates, the party so aggrieved may make it the basis of a complaint, which shall be determined by reference as hereinafter provided. On the hearing of any such reference, the referees may affirm the order made by a majority of the parties, or direct the restoration of the rate reduced, and in a proper case make award to the party or parties injured by any evasion or unjustifiable reduction of a rate, as compensation for any damages which shall have been sustained. * * *

“If the east-bound competitive traffic actually transported by either of the parties of the second or third part, in any one month, shall not amount to the equal share to which it shall be entitled under the provisions of these articles, the balances shall be so adjusted as to give to each the proceeds of an equal share of the gross revenue received by both for the transportation of such traffic. * * *

Wabash, St. Louis and Pacific Railway Company by the Circuit Court of the United States for the eastern district of Missouri; and, as such receivers, they operated the railway committed to their charge until, under the decree and order of the court, the property was sold and transferred to the purchasers. The

“To prevent confusion in the settlement of accounts, the following distances are arbitrarily established: “From Council Bluffs to all points east thereof which take Chicago rates, five hundred miles; from Council Bluffs to all points east thereof which take Mississippi river rates, three hundred and forty miles. * * *

“No covenant, promise or agreement in said original articles or in these supplemental articles contained shall be so construed as to affect or control (otherwise than by securing equality of rates, as provided in said original and these supplemental articles) through traffic specially routed, marked and consigned by the shippers over through lines of which the Southern Pacific railroad does now, or shall hereafter, form a part; but the rates on all through traffic between competitive points which may be connected by a through line over the Southern Pacific railroad, shall be so adjusted that the rates between such points and all Chicago and Mississippi river points by way of the Southern Pacific shall be as high as by the way of Council Bluffs. * * *

“If, at any time while this contract remains in force, the construction of new railroads, or the extension of existing ones, or the purchase or lease of railroads, or traffic or other arrangements, made by any one or more of the parties hereto, shall materially change the relations now existing between the parties with regard to traffic, the contract set out in the original and in these supplemental articles shall be so modified, altered and amended as to establish between them, with regard to the then existing circumstances, substantially the relations hereby established between them with regard to the circumstances now existing. It is declared to be the purpose and intent of the parties to maintain the relations hereby established with regard to existing railroads and operating and traffic arrangements, and to adjust such relations to any change which may be made therein with regard to through traffic. If the parties cannot agree upon the modifications, alterations or amendments which shall be made, if any, under the provisions of this section, the difference or differences which may thereby arise shall be determined by reference as in the original and these supplemental articles provided. * * *

“Each party will contribute to a common fund all of the gross revenue which it shall receive for the transportation of both east and west-bound through traffic, hereinafter described, to or from Council Bluffs, and to and from Missouri valley, in the performance of the covenants, promises and agreements set out in said original and supplemental articles. For the purpose of ascertaining the full amounts of the gross revenue which the parties shall severally contribute, each shall account and pay for all through traffic, both east and west bound, so transported by it, as follows: For all through traffic, except lumber, between the said Union Pacific and the Sioux City Pacific railways and the railways of other parties hereto covered by said

receivers acquiesced in the contracts referred to until March 31, 1887, when, by consent of all the parties, they were abandoned.

In the course of business, under the contracts, the traffic involved was not actually divided between and carried by the companies in the proportions fixed; but the Wabash, St. Louis and Pacific Railway Company, among others, actually carried

original and supplemental articles, which shall originate at, be destined to, or cross the Mississippi river at any point between the cities of Dubuque and St. Louis, both inclusive, at the rates for like traffic between Chicago and Council Bluffs. Through traffic which shall be transported for the government of the United States shall be accounted for at the actual rates paid for the same; that is, the regular rate, less the discounts which may be made because of land grants. When a penalty is charged on traffic for excess of weights, such traffic shall be accounted for at the regular rates for actual weight. Each party shall deliver to each of the others quarter-monthly statements showing what through traffic covered by said original articles and the supplemental articles referred to has, during the quarter month immediately preceding, been transferred over its railroads, or any of them, in what it consisted, between what stations and in what directions it was transported, and the rates charged and received therefor.

“The party of the third part hereto undertakes to account to the other parties, and pay to the common fund, provided for in the second section hereof, at Chicago rates, for all through traffic which may be received on its line, which can be lawfully transported from the point at which it shall be received to destination or the proper connecting railway, over any of the through lines by the original articles and the supplemental articles established, with reasonable directness, through Council Bluffs, though such traffic, or some portion thereof, may not have been so actually transported; provided, however, that no greater amount of traffic to or from California points, actually transported by way of the line of the party of the third part and the Southern Pacific line, shall be reported to such common fund than the amount that shall be necessary (when added to the amount reported for other through traffic transported by the party of the third part) to make the sum equal to the proportion of the common fund to which the third party is entitled. Said common fund shall, when settlements are made between the parties in manner and form as provided in said original articles, be divided into four equal parts, one of which shall be paid to each of the parties hereto. This result shall be accomplished, so far as shall be practicable, by a physical division of the traffic to be accounted for (aided by diversion from one line to another) into four equal parts, one of which shall be transported by each of the parties hereto. When, for any reason, such diversion of the traffic has not been made during the month, the party or parties who shall receive an excess over the share to which it shall be entitled, as above provided, shall pay to the party or parties who shall not have received their full shares a sum or sums of money sufficient to make the division exact in producing gross revenue to the parties.”

more than the share allotted to it, and the Chicago, Milwaukee and St. Paul railway, among others, actually carried less. The pool commissioner, provided for by the contracts, ascertained and made a statement of the differences, and, in making an adjustment of them, directed that the Wabash receivers should pay to the Chicago, Milwaukee and St. Paul Railway Company a sum which, after deducting admitted credits, amounted to \$18,404.40; and this suit was instituted to recover that amount.

The defense is that the contract upon which the claim is based is against public policy, and void. The court below (THAYER, J.) sustained this defense, and the intervener appealed. There was no evidence of the rate fixed by the parties for the traffic involved in their contract, and no evidence as to their mode of operating under the contract beyond what is afforded by the contract itself.

John W. Cary, for appellant. *F. W. Lehmann*, for appellee.

CALDWELL, Circuit Judge (*after stating the facts*). The design of the contract on which the appellant rests its claim is not left to presumption or conjecture. Its purpose is apparent on the face of the instrument. Its object was not to avoid ruinous competition by entering into an arrangement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates. By the terms of the contract all of the roads are to be operated, as to through traffic, "as they should be if operated by one corporation which owned all of them." These seven corporations were made one company so far as concerned their relations with each other, with rival carriers, and with the public. Between them there could be no competition or freedom of action. To the extent of the traffic covered by this contract — and it covered no inconsiderable portion of the traffic of the continent — each company practically abdicated its functions as a common carrier, and conferred them on a new creation, for the sole purpose of suppressing competition. Before they entered into this contract, each of these companies had the power, and it was its duty, to make rates for itself, and to make them reasonable; but, by the terms of this contract, every one of the companies was divested of all its powers and discretion in this respect. The contract removed every incentive to the companies to afford

the public proper facilities, and to carry at reasonable rates; for under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.

A railroad company is a quasi public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy and void. *Railroad Co. v. Closser*, 126 Ind. 348; 26 N. E. Rep. 159; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404; 10 S. W. Rep. 81; *State v. Standard Oil Co.*, (Ohio Sup.) 30 N. E. Rep. 279; *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970; 6 South. Rep. 888; *Gibbs v. Gas Co.*, 130 U. S. 306; 9 Sup. Ct. Rep. 553; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Stanton v. Allen*, 5 Denio, 434; *Hooker v. Vandewater*, 4 Denio, 349; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530; 13 N. E. Rep. 169; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; *Sayre v. Association*, 1 Duv. 143; *U. S. v. Trans-Missouri Freight Assn.*, 7 C. C. A. 15; 58 Fed. Rep. 58.

But, conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. The contention rests upon a misconception of the character of this suit. The appellant's claim is grounded

on the illegal and void contract, and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract.

The contract contemplated two modes of pooling—one by an actual division of the traffic, and the other by a division of the gross earnings. The traffic not having been divided, this is a suit to enforce the second method of the pool—a division of the gross earnings; or, in other words, a pooling of the earnings. The illegal and void contract has not been executed, and the appellant invokes the aid of the court to compel the Wabash Company to execute it on its part by pooling its earnings. It may be conceded that the illegal contract has been performed on the part of the appellant, though it does not appear to have done anything more than to sign the contract. The only thing it could do towards a performance of the contract was not to compete for the business. This was a violation of its duty to the public, and illegal. But a contract performed on one side only is not an executed contract. Where an illegal act is to be done and paid for, the contract is not executed until the act is done and paid for. A court will not compel the act to be done, even though it has been paid for. Neither will it compel payment, although the act has been done; for this would be to enforce the illegal contract. The illegality taints the entire contract, and neither of the parties to it can successfully make it the foundation of an action in a court of justice. The Wabash Company performed the service that earned the money the appellant is seeking to recover. The appellant earned no part of it. There is nothing in the record to show that the appellant would have carried more or the Wabash Company less freight if the contract had never been entered into. The money demanded was received by the Wabash Company for freight tendered to it by shippers themselves, and carried by it over its own line. It was legally bound to accept the freight thus tendered, and was entitled to receive the compensation for the carriage, and cannot be compelled to pay the money thus earned, or any part of it, to the appellant on this illegal and void contract.

The case of *Brooks v. Martin*, 2 Wall. 70, is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defense against a demand that existed independently of the contract; whereas, in this case, the

illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; 11 Sup. Ct. Rep. 478; *Gibbs v. Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970; 6 South. Rep. 888; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173; *Hooker v. Vandewater*, 4 Denio, 349. We have not overlooked the case of *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306. The opinion in that case is not supported by the authorities, and is unsound in principle.

The decree of the court below is affirmed.*

Agreements, combinations and pools between common carriers for the purpose of controlling rates and preventing competition.—Agreements between common carriers by which rates are established and traffic or earnings divided in certain fixed proportions, have been uniformly condemned by the courts in this country. *Cleveland, etc., R. Co. v. Closser*, (Ind.) 3 Am. R. R. & Corp. Rep. 686 (1890); *Anderson v. Jett*, 89 Ky. 375; 12 S. W. Rep. 670 (1889); *Texas & Pacific R. Co. v. Southern Pac. R. Co.*, 41 La. Ann. 970; 6 South. Rep. 888 (1889); *Fabacher v. Bryant*, 46 La. Ann. —; 15 South. Rep. 181 (1894); *Hooker v. Vandewater*, 4 Denio, 349 (1847); *Stanton v. Allen*, 5 Denio, 434 (1848); *Watson v. Harlem & N. Y. Nav. Co.*, 52 How. Pr. 348 (1877); *Gulf, etc., R. Co. v. State*, 72 Tex. 404; 10 S. W. Rep. 81 (1888); *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.*, (C. C. A.) ante, p. 173.

The contrary was held by Vice-Chancellor WOOD in *Hare v. London & N. W. R. Co.*, 2 John. & Hen. 80 (1861), and this is the only case directly to the contrary. There is, perhaps, an indirect sanction of such agreements by MATTHEWS, J., in *Central Trust Co. v. Ohio Central R. Co.*, 23 Fed. Rep. 306 (1885), but the case cannot be regarded as an authority in point. It is expressly disapproved in the principal case. See end of opinion.

In *United States v. Trans-Missouri Freight Assn.*, (C. C. A.) 8 Am. R. R. & Corp. Rep. 523, the agreement, which was sustained by the court, provided for the establishing of rates, but otherwise presented no features open to legal objection. Except to prevent fraud, establish uniform rates and uniform classification, it did not restrain the freedom of the parties. Any party could make any desired change of rates, regardless of the agreement, by giving ten

* Reported in 61 Fed. Rep. 993.

days' notice, and could withdraw from the association by giving thirty days' notice. The agreement did not, therefore, restrain any party, in the matter of rates, beyond the period of ten days. The parties were free to compete in every way except by offering lower rates. While sustaining the agreement, the court expresses the view that pooling contracts of the kind above referred to are undoubtedly void. See 8 Am. R. R. & Corp. Rep. 538. There is a vigorous dissenting opinion in the case, and the question cannot be considered as settled in the Federal courts until it is passed upon by the Supreme Court.

In *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 3 Am. R. R. & Corp. Rep. 22 (1890), the facts were that the plaintiff company leased its road, rolling stock and equipment to the defendant company, and the latter had possession of and operated the road under various leases and contracts for more than thirty years. A bill was filed for the return of the rolling stock, for an accounting and for other purposes. The defendant pleaded in bar, among other things, that the two roads were rival and competing roads, that the leases and contracts were entered into to prevent competition and had in fact destroyed and prevented it. The court held that the mere fact that the leases and contracts were entered into for the purpose of preventing competition and had accomplished the purpose, without any showing that the design or effect was or had been to obtain unreasonable rates or to prejudice the public, was not sufficient to render them void, and on this ground sustained a demurrer to the plea. After the defendant had been in possession for ten years a statute was passed forbidding any such consolidation or agreement between competing lines. The court held that while this statute did not affect anything which had been done prior to its enactment, it rendered unlawful any further execution of the contracts. But the court held that though the contracts were forbidden by an express statute, this was no bar to the relief sought. Much less then would the fact that the agreements were void at common law be such a bar, and this seems to be the real ground of the decision in the case. The whole discussion concerning the validity or invalidity of the contracts might have been omitted. The decision would have been the same if the contracts had been admitted to be void from the beginning. Moreover, the contract before the court in this case was very different from the ordinary form of contract between railroad companies to control rates and prevent competition, where each company continues to control and operate its own road. In the New Hampshire case the plaintiff company leased its road and equipment outright and in good faith to the defendant, and the latter controlled and operated both roads as one common property, and, presumably, was liable for the agreed rental, whether it succeeded in making the leased property pay or not.

In *Hearn v. Griffin*, 2 Chitty, 407 (1815), an agreement between two stage coach proprietors to charge the same prices, to run on different days and not to run in opposition to each other was held valid by the Court of King's Bench. To the argument that the agreement was "in restraint of that competition in trade which is so conducive to the interest of the public," Lord ELLENBOROUGH, Ch. J., replied: "How can you contend that it is in restraint of trade; they are left at liberty to charge what they like, though not more than each other; and by the agreement, particular days and times for each to

run in the week are fixed. This is merely a convenient mode of arranging two concerns which might otherwise ruin each other." And again: "If this argument could be sustained, then a covenant in an indenture of partnership, that neither of the partners should be engaged in any other business with any other persons, would not be good, because it might prevent the public from having the advantage of his industry in another business. Each contracting party here has one day to work his particular coach. Nor is there any limitation as to size of the coach; the defendant may have a long coach. This agreement does not preclude a third or more persons from starting in opposition to plaintiff and defendant."

Another English case, often cited as upholding agreements of the sort in question, is *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544 (1888); in Court of Appeals, 23 Q. B. Div. 598 (1889); in House of Lords, (1892) App. Cas. 25. While this is a case of great importance, and evoked a discussion which took a wide range in what may be called legal economics, and was the occasion of many learned and suggestive opinions, the points actually decided do not constitute any departure from established precedents or establish any new rules of law. The case was this: The proprietors of a number of steamship lines plying between China and England formed themselves into a conference or association, for the purpose of securing to themselves the entire tea freight from China to England, and so ultimately of maintaining higher rates, and they proposed to accomplish this purpose by offering certain rebates to those who shipped exclusively by conference steamers for a specified time, and by underbidding any and all competitors, wherever they attempted to obtain a cargo, and without regard to whether the rates offered were remunerative or not. Plaintiffs, proprietors of a competing line or steamer, claiming to have been damaged by the practices of the association, which had compelled them to carry at a loss or abandon the trade, sued the members thereof in an action *ex delicto* for damages. It was held that the object proposed by the association was not an unlawful one, and that the means proposed and actually employed for its accomplishment were not unlawful, and, therefore, that all that was done by the defendants was done in the course of legitimate competition in trade, and that any damage resulting therefrom was *damnum absque injuria*. There was but one dissent. Whether or not the agreement of association was lawful in the sense of being legally binding upon the parties and of being enforceable by or against them, was not involved and was not decided. Some of the judges who concurred thought the agreement was unlawful in the sense of not being enforceable; some thought otherwise, and some expressed no opinion on the subject. But all agreed that even if unlawful in that sense, that fact alone would not make the parties liable for acts done in pursuance of it. It is not likely that any different conclusion upon the question actually presented and decided would have been reached by any court in this country. Parties may make contracts in unreasonable restraint of trade, or contracts to prevent competition and to establish or enhance prices, or to limit production or supply, or to gain control of any particular trade or business, and may carry out such contracts if they choose to do so, and neither the making nor the execution of such contracts will render them liable at common law to outsiders who sustain loss in consequence thereof. The only ban

which the common law places upon such contracts is to keep its hands off, to leave the parties where they leave themselves.

The only cases, therefore, which really and necessarily hold that an agreement between carriers to establish prices and prevent competition is valid and binding are *Hearn v. Griffin*, 2 Chitty, 407 (1815); *Hare v. London & N. W. R. Co.*, 2 John. & Hen. 80 (1861), and *United States v. Trans-Missouri Freight Assn.*, (C. C. A.) 8 Am. R. R. & Corp. Rep. 523 (1898), and these have been explained above.

OAKDALE MANUFG. CO. ET AL. V. GARST.

(Supreme Court of Rhode Island, February 27, 1894.)

1. CORPORATIONS. CONSOLIDATION OF SEVERAL INDEPENDENT BUSINESSES UNDER ONE CORPORATION. MONOPOLY. A contract by which three of four companies in New England, engaged in the manufacture of oleomargarine, consolidate as a corporation, partly for the purpose of stopping the sharp competition between them, and agree that none of them shall separately engage in the business for five years, is not invalid as constituting a monopoly.

2. INCORPORATION UNDER LAWS OF FOREIGN STATE TO DO BUSINESS IN STATE OF DOMICILE. It is not against the laws or policy of a state for citizens to form a corporation under the laws of another state to do business in the state of their citizenship.

3. CONTRACTS IN RESTRAINT OF TRADE. It is not an unreasonable restriction on trade for persons, forming a corporation under which they shall unite their business of manufacturing oleomargarine, to agree that none of them shall separately engage in the business for five years, without any limitation as to territory, they having in contemplation an extensive business, which should include the building up of a foreign trade.

BILL in equity by the Oakdale Manufacturing Company and others against Sebastian Garst for an injunction to restrain the defendant from carrying on business in violation of the following agreement: "And it is further mutually covenanted and agreed by and between the parties hereto, each for himself, however, and not for the others, that they will not engage, directly or indirectly, in any business of the same kind, or for the same purpose or purposes, as that to be carried on by the corporation to be formed; nor will they directly or indirectly be concerned in or be interested in any firm, firms, corporation or corporations engaged in the same business or business similar to the business of the corporation to be formed for the period of five years from and after the date of this agreement." The com-

plainant the Oakdale Manufacturing Company is the corporation organized by the other parties to the suit, under the laws of the state of Kentucky, in pursuance of the agreement referred to in the opinion of the court.

Arnold Green, Richard B. Comstock, and Rathbone Gardner, for complainants. *Simon S. Lapham,* for respondent.

STINNESS, J. The complainants seek an injunction against the respondent to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end all the parties turned in the stock, machinery, accounts and good will of their respective concerns, at a valuation greatly in excess of the value of the property itself, taking an amount of stock in the corporation represented by such valuation. The corporation has carried on the business since that time. In August, 1892, the defendant sold his stock in the company, to present holders, for \$60,000, although, as he says, the property it represented was worth only about \$28,000. After this he entered the same business again, and claims the right to do so upon the following grounds, viz. : (1) That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants; (2) that the contract is void as a combination to raise the price of a necessary and useful commodity in trade and to stifle competition; (3) that one purpose of the contract was to form a corporation in violation of the laws of this state; (4) that, the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates, and that it was engaged to some extent in such export, are shown by the proof.

In support of the second ground of defense the respondent cites cases of contracts to create a monopoly and to force prices. Such was *People v. North River Sugar Refining Co.*, 54 Hun, 354; 7 N. Y. Supp. 406, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the Court of Appeals (121 N. Y. 582; 24 N. E. Rep. 834) the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. *Arnot v. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, and *Emery v. Candle Co.*, 47 Ohio St. 320; 24 N. E. Rep. 660, were cases where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combinations may have the effect to diminish the number of competitors in business, is, therefore, illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. This is well put in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, where twenty-four owners of stone quarries, on account of a ruinous competition, which made it impossible to work their quarries at a profit, made an agreement to sell through a common agent for the space of six months, and

the agreement was sustained. The court says: "But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages the industry, diminishes the production, prevents competition, enhances prices, and being made by large companies or corporations excludes rivalry, and engrosses the markets — tends to 'make a corner,' to use the slang of the stock and provision gamblers — it is against the policy of the law. But restraints upon trade imposed by agreement, under limitations as to locality, time and persons, are not necessarily restraints of trade in the general sense which is objectionable." So in *Tode v. Gross*, 127 N. Y. 480; 28 N. E. Rep. 469, the defendants had sold their business of making cheese by secret process, under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction on either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. The restriction under consideration, however, was not unlimited as to time." These two cases state a very sensible rule, both as to the public and the parties, and they are exactly like the case before us. Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy

of this state, and, if it did, the defendant, being a party to it, could not set it up. *Chafee v. Manufacturing Co.*, 14 R. I. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court. *Bank v. Kendall*, 7 R. I. 77; *Machine Co. v. York*, 11 R. I. 388; *Smelting Co. v. Smith*, 13 R. I. 27; *Manufacturing Co. v. King*, 14 R. I. 511. They are also recognized as doing business here by comity. *Pierce v. Crompton*, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders, given to creditors under our statute, are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, chap. 1200) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu* with social progress, to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (*French v. Parker*, 16 R. I. 219; 14 Atl. Rep. 870), nor of space (*Herreshoff v. Boutineau*, 17 R. I. 3; 19 Atl. Rep. 712); but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in

Wiley v. Baumgarden, 97 Ind. 66, cited by the respondent, sale was made of a dry goods store, with the vendor's agreement not to engage in the dry goods business for five years; and in Herreshoff v. Boutineau the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character, and outside restraint was unreasonable. On the other hand, in Thermometer Co. v. Pool, 51 Hun, 157; 4 N. Y. Supp. 861, where the business was extensive, restraint within the entire territory of the United States, and in Tode v. Gross, 127 N. Y. 480; 28 N. E. Rep. 469, unlimited restraint as to territory, were sustained. The contract is to be determined by its subject-matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for, when he sold his stock, he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable. We think the complainants are entitled to the relief prayed for.*

* Reported in 28 Atl. Rep. 978.

CONSOLIDATION OF INDEPENDENT DEALERS OR PRODUCERS INTO A PARTNERSHIP OR CORPORATION—WHETHER THE LAW SETS ANY LIMIT TO THE EXTENT OF SUCH CONSOLIDATIONS AND WHETHER SUCH CONSOLIDATIONS MAY BE CARRIED TO THE EXTENT, OR MADE FOR THE PURPOSE, OF CREATING A PRACTICAL MONOPOLY.

A. LIMITATIONS UPON INDIVIDUAL ENTERPRISE IN TRADE AND BUSINESS.

B. CONSOLIDATION OF INDEPENDENT DEALERS OR PRODUCERS, NOT BEING INCORPORATED, INTO A PARTNERSHIP.

C. CONSOLIDATION OF INDEPENDENT DEALERS OR PRODUCERS, WHETHER INCORPORATED OR UNINCORPORATED, UNDER CORPORATE OWNERSHIP AND CONTROL.

D. WHETHER THE PURPOSE OF ACQUIRING THE PRACTICAL MONOPOLY OF ANY TRADE OR BUSINESS, WILL RENDER VOID CONTRACTS MADE IN PURSUANCE OF SUCH PURPOSE.

A. LIMITATIONS UPON INDIVIDUAL ENTERPRISE IN TRADE AND BUSINESS.

1. In general.—As preliminary to the general inquiry it may be well to inquire whether the law puts any limitations upon individual enterprise in trade and business. Beyond the obligation to refrain from the use of fraud, intimidation and violence, or any other unlawful means, we believe there are no such limitations, unless they are to be found in the law as to engrossing, forestalling and regrating, or in the law relating to “corners” in stocks and produce. A brief consideration of these subjects is given in the next succeeding sections.

2. Engrossing, forestalling and regrating.—Benjamin defines these offenses as follows:—*Forestalling*—“The buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price there.” *Regrating*—“The buying of corn or any other dead victual in any market and selling it again in the same market, or within four miles of the place.” *Engrossing*—“The getting into one’s possession or buying up large quantities of corn or other dead victuals with intent to sell them again.” Benj. Sales, § 514.

The ancient common law and ancient statutes made these acts criminal. *Rex v. Waddington*, 1 East, 143 (1800); *Rex v. Rusby*, 2 Peake N. P. 189 (1800); Stat. 5 & 6 Edward VI, chap. 14. The statutes were repealed in 1772 and the offenses were abolished in 1844 in England. 12 Geo. 3, chap. 71; 7 & 8 Vic. chap. 24. And see, generally, 3 Stephens’ Hist. Crim. Law, 199–201. The last prosecutions in England were those above cited in 1800, and we believe none were ever had in this country. The laws against forestalling, engrossing and regrating would forbid all merchandising and all trade of middlemen, and are so totally inconsistent with modern institutions, ideas and ways of business that they must be regarded as obsolete. In Story on Sales it is said: “These three prohibited acts are not only practiced every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy.” Story Sales, § 490.

See, generally, on the subject, 2 Whart. Crim. Law, § 1851; 1 Bish. on Crimes, § 521.

3. "Corners."— "Corners" are of modern origin, and are an outgrowth of speculation and gambling in stocks and provisions upon boards of trade and stock exchanges. A "corner" is made by buying up all of a given commodity available for delivery in a specified market, and then buying for future delivery, and so compelling those who have sold "short" to buy from, or settle with, those who have run the "corner," upon such terms as the latter choose to dictate. The first case on the subject is *Sampson v. Shaw*, 101 Mass. 145 (1869). Three parties entered into an *agreement* to "corner" the stock of a certain railroad company. The agreement was held to be illegal. The question was not considered at any length, the court simply saying: "It can hardly be denied that such a contract as that described in the auditor's report would be illegal and fraudulent. No association to carry out such a purpose would be recognized, at law or equity, as having any of the legal incidents of a copartnership. Neither party, as against the other, can enforce what remains to be done, or correct what has been done, under a contract, or rather a conspiracy, of that description." In *Raymond v. Leavitt*, 46 Mich. 447 (1881), the plaintiff sued the defendants to recover back money which the plaintiff had advanced to be used in carrying out an *agreement* to "corner" wheat in Detroit. It was held that the agreement was illegal, and that the plaintiff could not recover. The decision appears to be placed partly on the ground that the transactions contemplated were a species of gambling, and partly on the ground that the object of the agreement was to enhance the price of one of the necessities of life. It is intimated that an individual, acting on his own responsibility, might buy all the wheat he pleased.

The court says: "The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use the commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal. But it is enough to make them so questionable that very little further is required to bring them within distinct legal prohibition. * * * We must willfully shut our eyes before we can fail to see that a combination between a man who furnishes money and dealers who manipulate the market, where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in price, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it." Pp. 450, 452.

To the same effect as the last case is *Samuel v. Oliver*, 130 Ill. 73; 22 N. E. Rep. 499 (1889), which was decided under the common law, the transactions having taken place in St. Louis, Mo. So also is the case of *Leonard v. Poole*, 114 N. Y. 371 (1889). The evidence did not make it necessary to decide the question in *Wright v. Crabbs*, 78 Ind. 487 (1881). These, we

believe, are all the cases relating to "corners," which are decided upon common-law principles. By a statute of Illinois, passed in 1872, it is made a penal offense to "corner the market or attempt to do so." Crim. Code, § 130. There have been some decisions under this statute, but they cannot be taken as indicative of the common law. *Foss v. Cummings*, 149 Ill. 353; 36 N. E. Rep. 553; *Cummings v. Foss*, 40 Ill. App. 528; *Foss v. Cummings*, 47 Ill. App. 665.

The cases upon corners decide nothing more than the proposition laid down by *Greenhood*, and adopted by the Illinois court, which is as follows: "*Combinations* whose object is to create what are known as 'corners' in the market, or to control the traffic in any staple which is a popular necessity, or to enhance the prices thereof, or to withhold the same from the market, * * * are void." *Greenhood* Pub. Pol. 642. The cases decide that a *combination* or *agreement* to "corner" the market, and thus to force the price of a commodity to an unnatural and extortionate figure, is against public policy. The law will not enforce such an agreement as between the parties, nor will it enforce a contract made in furtherance of the purpose of such an agreement, in favor of one who entered into the contract sought to be enforced, with knowledge of the purpose sought to be attained by it. The cases do not decide that an individual, firm or corporation, acting singly, may not buy up stocks or provisions *ad libitum* and hold them for further sale at pleasure. Whether if an individual should undertake to run a "corner" on his own responsibility, without any agreement or combination with any other person, the courts would enforce, in his favor, contracts made by him, in pursuance of such purpose, is a question which does not appear to have been decided. This would simply be a case of *engrossing*, and unless the law against engrossing still prevails, there would be no illegality in such transactions. If in force, it would not cover a "corner" in stocks, since stocks are not victuals or one of the necessities of life. As stated in the last section, it is probable that the law against engrossing is obsolete. If not, it is certainly only in force in a very modified form. Wharton says: "While we must regard the provisions of the Roman and English statutes against middlemen and commission merchants as obsolete; and while in England the statute of 5 and 6 of Edward VI has been repealed by 12 George III, chap. 71, yet, entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross or absorb any particular necessary staple or constituent of life so as to impoverish and distress the mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value." 2 Whart. Crim. Law, § 1851. It would be difficult to bring a "corner" in produce within this definition. A "corner" does not impoverish and distress the "mass of the community." It affects them not at all, or only indirectly and remotely. Those who are impoverished and distressed by the "corner" are the speculators and gamblers on the exchange where the corner is run.

But even if the law against engrossing is in force to the extent stated by Wharton, it would apply only to the buying up of provisions and would not apply to the monopolizing of production and trade in general. It is with the latter that we are more especially concerned. No rule or principle can be

deduced from the cases upon "corners" or from the law against engrossing, forestalling and regrating, which would limit the right of an individual to enlarge his business and acquire trade, by any means which in themselves and apart from any purpose he had in view, would be legitimate and proper, even to the extent of securing a practical monopoly of any particular trade or business.

4. Whether an individual may purpose to acquire a practical monopoly of any trade or business and enforce contracts made in aid of such purpose.—We know of no case which denies to the individual these rights. The law sets no limits to the extent of a business which the individual may acquire and carry on. He may buy out a competitor and take from him a covenant not to engage in the same business in the same place. The law will enforce the contract of sale and the restraint, though made for the purpose of getting rid of competition. *Richards v. American Desk & Seating Co.*, ante, p. 99. If he may buy out one competitor, there seems to be no reason why he may not buy out all, and so acquire control of the trade or business. It is assumed that this may be done in *People v. North River Sugar Ref. Co.*, 1 Am. R. R. & Corp. Rep. 597, 608.

B. CONSOLIDATION OF INDEPENDENT DEALERS OR PRODUCERS, NOT BEING INCORPORATED, INTO A PARTNERSHIP.

5. Individuals and firms engaged in the same business may combine in a partnership, though for the purpose, or with the effect, of preventing competition.—In *Martin v. Russell*, 66 N. Y. 288, four individuals, engaged in the business of furnishing recruits for the army, entered into an agreement not to furnish recruits for less than a specified sum, and to share the profits and losses equally. The agreement apparently contemplated that they should continue to act and contract independently, but that such contracts should be for the benefit of all concerned. On a bill for an accounting, the trial court held that the agreement was void on its face as against public policy, but the Court of Appeals reversed his decision, and held that the agreement created a partnership between the parties and was valid. "The business of furnishing recruits was a lawful one," says the court, "and could be carried on by individuals or firms; when carried on by a firm, its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. Suppose they had formed a partnership to buy and sell wheat; how can it be doubted that they could lawfully agree in their articles of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price, nor sold for less than a certain other price. Such an agreement would certainly not, upon its face, be unlawful, and could only be condemned by proof that it was part of a conspiracy to control prices or create a monopoly, or that it was made for some other unlawful purpose." The decision is put upon the ground that the parties, by their agreement, had formed an actual, bona fide partnership with one common interest, and had not, while continuing to pursue the business independently, combined to prevent competition and control prices. A similar case is to be found in *Jones v. Clifford's Exr.*, 5 Fla. 510 (1854), where three pilots, appointed for the Pensacola harbor,

formed an association or partnership by which each was to have a day in turn to be on duty, and the earnings of all were to be divided equally. On a suit for an accounting, the agreement was held valid. The court says: "Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality. It made and conducts our government, constructs our railroads, our steam vessels, our magnificent ships, our temples of worship, structures for public and private use, our manufactories, creates our institutions for learning, builds up our cities and towns. Its very office is to do what individual exertion may not accomplish, and in a degree distinguishes civilized from savage life. Why, then, should this important agency be denied to this meritorious class of our citizens? They are in general men of small means, to whom an association may not only be desirable, but necessary and indispensable. Were our minds less clear on this subject, we are not permitted to assert the invalidity of the act on this account." See, also, *Flanders v. Wood*, 88 Tex. 277.

These cases, in which there is an actual unification of distinct concerns, are clearly distinguishable from the cases where independent concerns enter into an agreement or combination merely for the purpose of controlling prices or production or preventing competition. An example of the latter kind, bearing a seemingly close resemblance to the former, is to be found in *Craft v. McConoughey*, 79 Ill. 346. The agreement in the latter case is set forth at length in 1 Am. R. R. & Corp. Rep. 628, 629. By reference to the agreement it will be seen that the four houses which made the agreement, each retained its autonomy; each owned and operated its own plant and furnished its own capital. There was no common property, no joint business and no common fund. The only effect of the agreement was to prevent competition, establish prices and pool the proceeds of the business, to be divided in certain fixed proportions, and this last would be accomplished by each paying or receiving such sum as would make his share correspond with the proportion allowed him. See further, as to such agreements, *Nester v. Continental Brewing Co.*, post.

6. **Whether the consolidation of individuals and firms may be made, or a partnership formed, for the purpose of securing a practical monopoly of any particular trade or business, and whether contracts in aid of such purpose are valid and enforceable.**—By a *practical monopoly* we mean the obtaining sole control for the time being of any trade or business, by driving out, buying up or absorbing all competitors. The law, that is, the criminal law, does not prevent such a result being brought about if the parties are able to effect it, but the question is whether it will enforce contracts made in aid of such a purpose. While there are many cases bearing indirectly upon this question, we are aware of but one case in which the precise question was actually presented and decided. This is the case of *Chappel v. Brockway*, 21 Wend. 157 (1839). A large number of persons were associated as a firm, under the name of the Rochester and Buffalo Packet Boat Company, and were engaged in operating boats in the Erie canal between Rochester and Buf-

falo. The defendant, being engaged in the same business in competition with the company, sold out his boats and other property connected with the business to the company for the sum of \$12,500, and, as part consideration, gave a bond to the plaintiff for the use of the company, conditioned that he would not at any time thereafter own, run or be interested in any line of packet boats on the Erie canal from Rochester to Buffalo. The defendant put on a new line of packet boats in violation of his agreement, and the suit was for a breach of the bond. The tenth plea was that the defendant and the Rochester and Buffalo Packet Boat Company were competitors for business on the Erie canal; that the company, by reducing the rates of fare, compelled him to sell out to them; *that the object of the company was to obtain a monopoly*, and when they had no competitor they raised the prices and thus enriched themselves at the expense of the public; that under these circumstances he became the owner of a new line of packet boats, by means of which travelers were again furnished with a cheap, safe and convenient mode of transportation. The eleventh plea was substantially the same and to these pleas there were demurrers. It was thus distinctly admitted that the object which the company had in view was to obtain a *monopoly* of the carrying business between the points in question, that is, to become the *sole* carriers between those points, and the bond was given and the restraint imposed upon the defendant, in aid of such object. The court held that the pleas were bad and the bond valid. The court, by BRONSON, J., says: "Neither the tenth nor the eleventh plea contains any legal answer to the action. The principal merit of both seems to consist in ascribing a questionable motive to the plaintiff, or those for whom he is trustee, for entering into a contract which was apparently free from objection. * * * The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise. If we strike out this offensive word, little will remain, either of the pleas or of the argument that was built upon them. The tenth plea will then only amount in substance to this: The packet boat company purchased out the defendant for the purpose of bettering their own condition; or, what amounts to the same thing, for the purpose of obtaining a better price for carrying passengers. Now, this is nothing more than the usual motive for entering into such contracts, and we might as well declare them all void at once as to give way to this objection. It does not necessarily follow that the public was injured because the price for carrying was raised. The traveler has other interests at stake, besides that which immediately touches his pocket, and there may be such a thing as riding at too cheap a rate. Competition in business, though generally beneficial to the public, may be carried to such excess as to become an evil." And in speaking of matters in the eleventh plea, he continues: "And as to the charge of combination and confederacy, having for its object a monopoly, the whole amounts to little more than a string of words, which are in bad repute, because they most commonly stand connected with bad acts. Fifty persons of great wealth and influence, as the plea alleges, combined together to run a line of

packet boats in opposition to the defendant's line — all which it was quite lawful for them to do. But they not only intended to run an opposition, but intended to carry passengers at half the fair price, and thus get away the defendant's business, unless he would also carry at half price; and this too was lawful. The end at which they aimed in all this matter was to get a monopoly of the business, so far as competition depended on the defendant." And in conclusion the court says: "If any danger to the public interests can justly be apprehended from allowing many men of wealth and influence to associate as partners for the purpose of carrying on business; or if that competition which results from the enterprising character of our citizens and the active employment of capital ought to be regulated or restrained, it belongs to the legislature, and not to the courts, to apply the proper remedy."

According to this authority it is lawful for persons to unite in a bona fide partnership for the avowed purpose of obtaining control of any particular trade or business, and contracts and restraints made in the prosecution of such purpose, which would be valid if considered by themselves, are not rendered void by reason of the motive which prompted them.

C. CONSOLIDATION OF INDEPENDENT DEALERS OR PRODUCERS, WHETHER INCORPORATED OR UNINCORPORATED, UNDER CORPORATE OWNERSHIP AND CONTROL.

7. Independent dealers and producers, whether individuals, firms or corporations, may combine into a single corporation.— There is no doubt but what individuals and firms engaged in the same business may form a corporation for the purpose of taking over their several businesses and consolidating them under the absolute control and management of such corporation. All proper contracts made in aid of such consolidation will be enforced by the courts. The principal case is an authority in point.

Independent corporations cannot consolidate, in the technical sense, except as allowed by law, and to the extent that such consolidation is allowed, it is, of course, legitimate and valid. But an ordinary business corporation, with the consent of all its stockholders, may, unless prohibited by law, sell its property and business and wind up its affairs, and two or more corporations may thus effect a consolidation of their business, by selling out to a new corporation organized for that purpose, and ceasing to exist as independent entities. See, generally, 1 Beach. Priv. Corp. §§ 326, 359; 2 Beach. Priv. Corp. § 781; 2 Mor. Priv. Corp. §§ 940, 941. There seems to be no reason why a corporation organized to carry on a particular business, may not take over an existing business with a plant and stock of goods or raw materials adapted to its purposes, whether the same belongs to an individual, firm or corporation. The only question would be whether one corporation could sell out its entire property and business to another. *People v. Ballard*, 6 Am. R. R. & Corp. Rep. 635; *Central Trans. Co. v. Pullman Palace Car Co.*, 4 Am. R. R. & Corp. Rep. 172. But if the corporation is organized for a purely private purpose, and all its stockholders consent and all its creditors are provided for, there would seem to be no reason why it could not be done. *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 4 Am. R. R. & Corp. Rep. 555; *Small v. Minneapolis Electro-Matrix Co.*, 4 Am. R. R. & Corp. Rep. 31, and note.

Individuals, firms and corporations, dealing independently, may thus become consolidated, by selling to a corporation, having the power to carry on the business in which they are engaged, for stock in such corporation. This is a very common thing in practice, and so long as the consolidation is on a small scale, or is local merely, or composed of few out of many engaged in the same business, the transaction is not impugned. Ordinarily, corporations may be formed without limit as to capital, and may carry on their business in one or many places and in one or many states. In the absence of express statutes on the subject, does the law set any limit to the extent to which a corporation may go in enlarging its business, by buying up rival concerns or creating new establishments? This question is considered in the next section.

8. Whether the law sets any limit to the extent to which independent businesses may be consolidated under the ownership and control of a single corporation and beyond which it will not enforce contracts in aid of such consolidation.—In the principal case three out of four concerns in New England, engaged in the manufacture of oleomargarine, united to form the plaintiff corporation. There were still other concerns, engaged in the same business, in other parts of the country. The transaction was held to be entirely legitimate, and a contract and restraint of trade in aid of the consolidated concern was enforced. Had the four concerns thus united the reasoning of the court leaves no doubt that it would have been held equally legitimate. But suppose the plaintiff had been formed for the avowed purpose, on the part of its promoters, of combining all the oleomargarine manufacturing in the country, would the case have been different? The only case which undertakes to deal with this question is that of *Richardson v. Buhl*, 77 Mich. 632; 1 Am. R. R. & Corp. Rep. 534. It was found in that case that the Diamond Match Company, a Connecticut corporation, was organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada. This, of course, was the intent of its promoters, and not the purpose expressed in its charter. Its articles of incorporation simply declared its purpose in the usual way, in language broad enough to authorize the carrying on the business on a large or small scale. See quotation from charter, 1 Am. R. R. & Corp. Rep. 536, 537. So far as can be gathered from the Michigan case, the method pursued by the company was to induce existing manufacturers to turn over their plant and stock to the company for stock therein, and, if they could not be induced to thus consolidate, then their business was bought outright upon the best terms that could be made. The company in this way succeeded in acquiring thirty-one establishments, being substantially all the factories engaged in that business in the United States. 1 Am. R. R. & Corp. Rep. 556. The corporation itself is apparently declared to be an unlawful association, and the resulting aggregation of property, capital and business is denounced as an unlawful "combination," inimicable to the public good. See especially the language of SHERWOOD, Ch. J., 1 Am. R. R. & Corp. Rep. 554, 555, and CHAMPLIN, J., 1 Am. R. R. & Corp. Rep. 556, 557.

There appears, however, to have been no combination of independent concerns, which still remained independent, and which still continued in the separate ownership and management of their business, subject only to certain restrictions imposed by the combination agreement. On the contrary, each

new establishment as it was bought became the absolute property of the Diamond Match Company and a part of its general assets. The stock issued for it, if it was acquired in that way, did not represent the particular property transferred, or entitle its holders to such property, but was, like all other stock in all other corporations, simply evidence of the holder's proportional interest in the aggregate property of the concern. Each transaction by which the Diamond Match Company acquired the property and business of an independent producer was clearly within the powers conferred by its charter, and, considered by itself, was in every way legitimate. Had the Diamond Match Company acquired merely two or three or half a dozen of the thirty odd factories, with no purpose to acquire all, the transactions would have been unimpeachable. But, because the promoters and managers of the corporation had the purpose of acquiring control of the match business of the country, the court holds, for such is the necessary inference from its decision and reasoning, that the corporation itself was an illegal organization, and that each and all of its transactions in acquiring properties were affected, if not vitiated, by the same unlawful intent. According to the Michigan case the Diamond Match Company could not have enforced any contract made in furtherance of the scheme of its managers from the first step in its course to the final consummation of its purpose. Nor could any individual, firm or corporation enforce against the Diamond Match Company, or as between themselves, any contract knowingly made in aid of such purpose, or any right dependent upon such a contract. SHERWOOD, Ch. J., says: "In my judgment not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy." 1 Am. R. R. & Corp. Rep. 555. He refers to no authorities whatever in support of his position. CHAMPLIN, J., referring to the Diamond Match Company, says: "Such combinations have frequently been condemned by the courts as unlawful and against public policy." 1 Am. R. R. & Corp. Rep. 557. He refers to a number of authorities, not one of which, however, is an instance of *such* a combination. They are cases where independent concerns have combined, or agreed together temporarily, to control prices or production and prevent competition.

At the time in question neither the statutes of Michigan nor of Connecticut fixed any limit to the capital which a corporation might have. But few states have set any limit in this regard. See 2 Stimson Am. Stat. Law, p. 22, § 8015. It may be said to be the policy of the law, therefore, to permit corporations to have just as large a capital and do just as large a business as they please. There is no doubt but what a corporation, organized to manufacture and sell matches, could build and operate as many different factories in as many different places as it saw fit. No principle of law denies it this power. But a corporation with power to build and equip a factory may buy one already built and equipped. And if it may build thirty, why may it not buy thirty? Clearly it may if it is not actuated by a purpose to monopolize the business.

The question then is whether the purpose on the part of the corporation or its managers to acquire control of a particular trade is an unlawful purpose,

such as will render void all contracts made in furtherance of the scheme. It is difficult to see why any different rule should apply to corporations than to individuals or firms in this respect. The particular transactions of the Diamond Match Company, by which it acquired its various plants, were not unlawful in themselves. They were only made unlawful by the existence of a purpose to acquire all. If an individual or firm had entered upon the same scheme, with the same purpose, all transactions in execution of the purpose would have been equally unlawful. The question then is broadened to this, whether the existence of a purpose on the part of an individual, firm or corporation, to acquire control of a particular trade, will vitiate every contract made in furtherance of such purpose, in the sense that the law will not enforce it?

Before passing to this question it may be well to say that, so far as the consolidation of independent establishments under corporate management is concerned, we have reference only to cases where the corporation is bona fide, and the establishments to be consolidated are purchased absolutely and in good faith, and the whole are unified as one common property. Such cases are to be distinguished from those where the corporation is used as a mere cover for a combination of independent dealers or producers, as in the following cases: *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224; *Clancy v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 895; *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. Rep. 721.

D. WHETHER THE PURPOSE OF ACQUIRING THE PRACTICAL MONOPOLY OF ANY TRADE OR BUSINESS WILL RENDER VOID CONTRACTS MADE IN PURSUANCE OF SUCH PURPOSE.

9. Different modes in which a practical monopoly of any trade or business may be acquired or established.—A practical monopoly of any trade or business exists when substantially the whole of the trade or business is in the hands of a single concern, or when all the different concerns engaged in the business are so united by some form of agreement or arrangement that all competition is extinguished, and the entire trade or business is controlled and managed by some central authority. (1) Such a monopoly may be brought about as the result of competition. One concern may succeed in driving all competitors to the wall, and thus remain sole possessor of the field. This is the complete success and final consummation of the principle of competition. (2) The one concern, instead of driving competitors to the wall may buy them out, and thus accomplish the same end. (3) All the different competitors may unite bona fide into a partnership or corporation, and thus secure a complete unification of diverse properties and interests. (4) Or, as already suggested, the different competitors may enter into some agreement or arrangement, by which, without complete unification, the entire trade or business is controlled by one central authority. (5) Finally, a monopoly may be brought about by the employment of some or all of these methods, so as to produce the desired result.

The last method needs no separate consideration. The first is unquestionably legitimate. The law favors competition, and so long as only lawful means are employed, the law sets no bounds to the amount of trade one may acquire

thereby, or to the ruin which may be inflicted upon others. The fourth method is as unquestionably illegal as the first is legitimate. *Nester v. Continental Brewing Co.*, post and note. The second and third methods present more difficulty. There is no principle of the common law which can be invoked to prevent the establishment of a monopoly in either of these ways. The only question is whether it will enforce contracts made with that object in view and the enforcement of which will, or may, contribute towards the consummation of the end sought. A monopoly is established according to the second method by one concern successively buying out all competitors. If all competitors unite in a corporation according to the third method, the consolidation must be worked out by the corporation buying the business of the several constituents. This is, therefore, the same process as the second. The union of competitors in a firm, according to the third method, could only be applied in cases of individuals and firms, and might then be accomplished by a single transaction in which all unite, or by successive transactions, beginning with the union of two or more and the subsequent bringing in of the others. Three questions are, therefore, presented which form the caption of the next section.

10. (1) Will the purchase by one competitor of the business of another be enforced by the courts when the purchase is made with the intent of buying out all competitors and thus securing a practical monopoly of the business? (2) Will a contract of partnership between two or more competitors be enforced when made with the intent of bringing in all other competitors, if possible? (3) Will a contract of partnership between all those engaged in the same trade or business be enforced, the result being to establish a practical monopoly?—These questions might be reduced to one—will the courts enforce a contract made with the intent of establishing, and which, if enforced, may either aid in establishing or actually establish a practical monopoly? But we may perhaps better consider the questions in the form first stated. The transaction by which one buys out a competitor and takes from him a covenant not to compete in the same business is, upon its face, entirely legitimate. In discussing the tendency of such contracts to create monopolies, and prevent competition, and the propriety of permitting them to be made with such ends in view, the New York Court of Appeals says: "We are not aware of any rule of law which makes the motive of the covenantor the test of the validity of such a contract." *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 483. In *Chappel v. Brockway*, 21 Wend, 157, it was held that a restraint of trade, in connection with the sale of a business to a competitor was valid, though the object of the purchaser was to secure a practical monopoly of the business and the effect of the sale was, for the time being, to establish such a monopoly. It is not what the parties have in mind that determines whether a contract is against public policy, nor what has actually resulted or actually been done under the contract. It is the *tendency* of the contract and *what may be done under it* that forms the test of legality. See § 8 of note to *Gamewell Fire Alarm Tel. Co. v. Crane*, ante, p. 97.

The determination of what is for or against public policy may, and usually does, depend upon a balancing of conveniences and inconveniences, of good

tendencies and bad tendencies. This is especially the case of contracts in restraint of trade. A restraint considered by itself is necessarily and to some extent an injury to the individual and to the public. Hence the rule that a restraint of trade, if nothing more appears, is invalid. § 41 of note to *Richards v. American Desk & Seating Co.*, ante, p. 171. But it is for the benefit of the individual and the public that a person should be able to sell his business to the best advantage, and, therefore, that he should be able to preclude himself from competition with the purchaser. The advantage of such a restraint is found to overbalance the disadvantage, and so on the whole to tend to the public good. Hence the general rule that reasonable restraints are not against public policy.

It may be conceded that, as a general rule, whatever tends to prevent competition or to create a monopoly is opposed to public policy. If one competitor buys out another, or if two or more competitors combine to form a partnership or corporation, the transaction tends to prevent competition and tends to create a monopoly. If the transaction was repeated a sufficient number of times, the result must ultimately be the doing away with all competition and the establishing of a monopoly, so far as that is possible under present conditions. But if one competitor could not sell out to another, or two could not combine into a partnership or corporation, the most injurious consequences would result. The freedom of contract would be unduly restricted, the public would be deprived of the benefit of many economies in business, and those engaged in trade would often be compelled, either to continue in a business against their choice and to their detriment, or to submit to ruinous sacrifices. The balance of advantage seems clearly in favor of upholding the validity of such contracts, and there is no authority to the contrary.

If the law will enforce a contract by which one competitor buys out another, will it not enforce any number of repetitions of the contract which the vendee may choose to make, even to the extent of his buying out all competitors? If not, where is the line to be drawn and upon what principle? Will the law sustain a man in buying out one-half, three-fourths or nine-tenths of his competitors, while frowning upon his purpose of buying out all? There is certainly no rational basis upon which a limitation can be fixed. So with regard to the formation of partnerships and corporations by competitors. If the law will enforce a contract by which two competitors unite in a partnership or corporation, why will it not enforce a contract by which any number so unite? There is no rational basis for any limitation.

Again, a trade may be local and confined to a single town, or county or other very limited territory, or it may extend to a state, to the entire nation or even be world wide. If it is against public policy for one person, or one concern, to engross the whole of a national trade, is it not equally against public policy for one person or concern to engross the whole of any local trade? What is said by the New York Court of Appeals in regard to contracts in restraint of trade applies equally here. "If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of

the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract." *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 483. According to this authority, if it is against public policy for a person to acquire control of a trade that is national, it is equally against public policy for a person to acquire control of a trade that is local; and, conversely, if a contract is valid which secures to one person control of a local trade, there is nothing unlawful in a purpose to acquire control of a national trade, nor in contracts made in furtherance of such purpose. Now, if there are two grocers in a small town competing with each other, and only two, and one buys out the other for the express purpose of acquiring control of the business and preventing competition, the transaction is perfectly legitimate (see note, *Richards v. American Desk & Seating Co.*, ante, p. 99); and yet this transaction would affect each member of the local community in precisely the same way as each citizen of the republic would be affected, if all the flour mills of the country were to be brought into one common ownership and control. If the former transaction is lawful, why not the latter? Does the legality of the transaction depend upon the number of individuals affected? If so, how many must be affected to render the transaction illegal?

All these considerations lead to the conclusion that the three questions stated at the beginning of this section must be answered in the affirmative. The only doubt would seem to be as to corporations and their right to acquire a monopoly of a trade or business by buying out or absorbing all competitors. This doubt arises, not because any different principles apply to corporations than to individuals and firms, but because of the decision of the Michigan court in the case of the *Diamond Match Company*. We offer in the next section some further suggestions with special reference to the facts presented in that case.

11. **Some further suggestions with special reference to the acquiring of the practical monopoly of a trade or business by a corporation through the process of absorption and purchase.**—Undoubtedly there are very many strong expressions of opinion to be found in the cases to the effect that whatever tends to create a monopoly is opposed to public policy. See the cases cited in note to *Nester v. Continental Brewing Co.*, post. By "monopoly," as employed in these cases, is meant what we have termed a *practical monopoly*, or the bringing under one control substantially all of any trade or business. Following the bent of these opinions, the Michigan court held the *Diamond Match Company* to be an illegal organization because its incorporators and managers designed that it should acquire a monopoly of the match business. It may be that this precedent will be followed, and that wherever such a design can be imputed to a corporation it will be declared to be an illegal body, and that all contracts made by it in pursuance of such design will be treated as void. If so, consistency, as we have already shown, would require that the same rule should be applied to individuals and firms pursuing the same purpose by the same methods.

But monopolies are not illegal at common law. No person could be punished because he had acquired a monopoly of any trade or business. Nor

would he be liable to any civil action by one conceiving himself to be injured thereby, as by being charged more than was conceived to be a fair price for any service or commodity, or by being ruined in his business by legitimate competition. *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172; *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544; 23 Q. B. Div. 598; (1892) App. Cas. 25.

Moreover, the law does not *prevent* the establishment of monopolies, but permits and even aids their establishment by lawful means. These lawful means are competition, the buying out of competitors, and the union of competitors in partnerships. Corporations may not unite in partnerships for lack of legal capacity to do so. 1 Am. R. R. & Corp. Rep. 633. But corporations may buy out competitors, and no principle of law imposes any limitations upon their power to do so. For more than 200 years it has been considered as legitimate to buy trade as to acquire it by competition. No case has as yet set any limit to the amount of trade or number of competitors that an individual or firm may thus buy out. And no case has done so with reference to corporations, unless it is that of *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 534.

It is said of the Diamond Match Company, in the Michigan case, that "the sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure." Undoubtedly, it is the object of all persons engaged in trade to make money, and individuals combine into firms, and firms into corporations and corporations into trusts in order to make more money united than all could make singly. But how is such a concern as the Diamond Match Company, with a large number of plants on its hands and a vast capital invested, to make money? Manifestly, it can only do so by selling vast quantities of matches. To succeed in selling vast quantities of matches it must put the price at such a figure as will induce consumption. Great economies are possible in the use of matches. They are very cheap and are used with corresponding extravagance. If the cost was much greater the consumption would be much less. A large profit on small sales may be less in the aggregate than a small profit on large sales.

Again, no person can now have a monopoly of any trade in the strict sense of having the exclusive right to carry on such trade. If such a concern as the Diamond Match Company puts the price of its commodities too high, it may at any time induce competition. Moreover, every such concern takes the chances of the invention of new processes of manufacture or the discovery of some substitute for the product manufactured, which may greatly impair or entirely annihilate its business; and such inventions and discoveries are stimulated and rendered all the more probable by the fact of excessive profits in any trade.

Now, all these considerations are legitimate in discussing matters of public policy, and the question is whether individuals, firms and corporations should not be left free to pursue trade in their own way, upon a large scale or small, according to their choice or ability, provided always that they abstain from the use of any unlawful means. For the courts to undertake to set limits to the amount of trade which one concern may acquire or control is to strike at the

roots of all industrial and commercial enterprise, and to set up an arbitrary rule which cannot be applied in practice without leading to inextricable confusion and contradiction. One rule cannot be made for corporations and another for individuals and firms; one rule cannot be made for trade which is national and another for trade which is local. And yet the same rule cannot be applied to all without leading to manifest injustice and absurdity.

If the aggregation of enormous amounts of capital under corporate management, and the advantages which that confers in the pursuit of trade, are a menace to the welfare of the country, it belongs to the legislature to correct the evil. If the legislature authorizes such aggregations of capital it is not for the courts to say that it is against public policy. Nor is it for the courts to say that a corporation created by the legislature, and authorized to pursue a particular business or trade, may not do so to the same extent and with the same ambitious purpose that would be lawful in an individual, having the same capital. The legislature, of course, may fix any limit it pleases to the amount of stock a corporation may have, to the amount of property it may own or acquire, to the amount of surplus it may accumulate, and the amount of indebtedness it may incur, and may further circumscribe its operations in any manner it pleases. But so long as the legislature creates or authorizes corporations without limit as to the amount of their capital stock or property, and without limit as to the extent or place or manner in which they shall prosecute their business, it would seem to be an indication of legislative intent and of public policy that they should be left untrammelled in these respects, and subject only to such implied restraints and limitations as apply to individuals. If the magnitude and enterprise of corporations is to be curbed it should be left to the legislature to do so. Such enterprises as the Diamond Match Company could be prevented by limiting the capital, indebtedness and property which a corporation might have or incur, or by forbidding corporations from purchasing the business or property of any other corporation. A bona fide corporation, like the Diamond Match Company, organized to buy out all those engaged in a particular trade or business, and thus to secure sole control of that trade or business for the time being, differs widely, and can scarcely be said to bear any analogy to an *agreement* or *combination* between independent dealers and producers, which does not result in an *actual* bona fide union of their property and business, but is made solely to prevent competition between themselves, to establish and maintain prices, and to limit the amount of a commodity which the parties should produce or supply. In agreements of this sort the preventing of competition is not a mere incident resulting from a transaction which the law favors and which public policy approves, but it is the entire end and aim of the agreement. The Diamond Match Company has been called a "combination" and a "trust," but it was no more of either than the corporation in the principal case, or than the bona fide union of two competitors in a partnership. These suggestions of doubts as to the correctness of the decision in the case of the Diamond Match Company are strongly supported by much of the reasoning in *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544 (1888); 23 Q. B. Div. 598 (1889); (1892) App. Cas. 25.

NESTER ET AL. V. CONTINENTAL BREWING Co. ET AL.

(Supreme Court of Pennsylvania, May 14, 1894.)

1. AGREEMENTS OR COMBINATIONS AMONG INDEPENDENT TRADERS TO CONTROL PRICES AND PREVENT COMPETITION. VALIDITY. A combination among a number of brewers of a city to control the price of beer within the city is illegal, as imposing a restraint of trade injurious to the public.

2. SUCH AGREEMENTS NEED NOT RELATE TO THE NECESSARIES OF LIFE TO BE INVALID. Agreements to control prices and prevent competition need not relate to the necessities of life in order to be invalid; it is enough that they relate to articles of daily consumption or in common use, and beer is of this class.

3. RIGHT, AS BETWEEN THE PARTIES, TO ENFORCE THE PAYMENT OF MONEY DUE UNDER SUCH AGREEMENTS. Where an association is formed to enable its members to control the price of a commodity of daily consumption, courts will not lend their aid to a member, or his assignee, who has notice of the nature of the combination, to recover the money due the member under the provisions of the combination.

SUIT by Samuel K. Nester and others against the Continental Brewing Company and others (being by the assignees of one member of an association against the association and the remaining members) to compel an account and payment of moneys alleged to be due to complainants. A demurrer was sustained to the bill, and plaintiffs appeal.

The following is the opinion of BIDDLE, J.:

"The bill of complaint in this case sets out that the defendants became members of the Brewers' Association of Philadelphia, which is an unincorporated association, familiarly known among its members as the 'Brewers' Pool,' and also as the 'Pool;' that, under the articles of agreement, the defendants became indebted to them in a large amount of money, and that they have made repeated demands upon them for an account, and for payment of the amount due them under the provisions of the agreement, but the said account and payment have been refused. They, therefore, pray that an account may be taken, by and under the decree and direction of the court, of all the dealings and transactions of the said the Brewers' Association of Philadelphia, under the aforesaid agreement, for the said term, beginning on July 1, 1886, and ending on June 30, 1887, and that the amounts found due shall be paid over. To this demurrers have been filed by several of the defendants, alleging '(1) that the plaintiffs have not, in and

by their said bill, shown such facts as would entitle them to the relief prayed for ; and (2) that the said agreement set out in the said bill, and alleged to have been entered into by the said Enterprise Brewing Company, Limited, and the defendants, and which the said plaintiffs seek to enforce, is not such an agreement as a court of equity will enforce, because the same is an agreement against public policy, and in restraint of trade.' The agreement, by the fifth section, provides that 'the undersigned hereby stipulate and bind themselves, one to the other, and do hereby agree, one with the other, not to sell and deliver any beer in the city and county of Philadelphia and Camden and Camden county, N. J., or which is to be used in the city and county of Philadelphia, Camden and Camden county, N. J., after July 1, 1886, to any new trade, or any other brewers' customer or customers that belong to this association, during the continuance of this agreement, at less than eight dollars a barrel.' For the violation of this agreement the severest penalties are then provided. By the sixteenth article 'the board of trustees may call the association together from time to time, and at any such meeting the price at which beer may be sold may be changed by a vote of not less than two-thirds of all the members belonging to said association at the time of voting thereon.' These are the only sections to which the demurrer would apply, and which it is necessary to consider at this time.

"It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of the county of Philadelphia, individuals, firms and corporations, who have entered into it, to regulate and control the sales and prices of beer within the city of Philadelphia and the county of Camden, N. J. It certainly is a combination in restraint of trade, tending to destroy competition, and to create a monopoly in an article of daily consumption. Is this, therefore, a matter in which a court of equity will interfere? It has been strenuously urged, and innumerable authorities have been cited to prove, that contracts in partial restraint of trade, limited by time and space, have been sustained, and that inasmuch as this only applies to 1,250,000 of people, and the space which they occupy, the agreement is perfectly lawful. While we admit the principle, we fail to see that it has any application to this case. Where a barber contracts not to open

a shop within one square of another, for the space of six months, equity would no doubt interfere to prevent its violation. But suppose it had been a gambling house, or a house of ill-fame, instead of a barber shop, equity would then refuse to interfere, because these establishments are held to be illegal, and their recognition against public policy. The question would be there, as here, not a question of time and space, but a question whether equity would take cognizance of such a subject. The restriction would rather, in a case of this sort, make the plan more objectionable. The fact that the city was to be placed in a worse position than all the rest of the state could not certainly be in accordance with any enlightened system of public policy. Professor Patterson, in his recent work on the Law of Contracts in Restraint of Trade, after an able and exhaustive examination of all the authorities, says (p. 51): 'The rule that is deducible from the cases seems to be that restraints on competition and production are valid, provided they be for the necessary protection of the parties' interests; but combinations between producers, to limit production and to enhance prices, are opposed to public policy, and are not merely void contracts, but are offenses, and punishable as such.' This doctrine is clearly that of our own state. See *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173. That this agreement is a necessary protection of the parties' interests is not averred, and we do not understand is contended. Where a price is fixed arbitrarily for which a manufactured article may be sold, it necessarily limits the production of that article to the amount that can be sold for that price. An increased price put upon an article restricts its sale, and the restricted sale necessarily reduces the production. It is no answer to say: 'We do not restrict your production. You may produce any amount you like. We only restrain your sale of it.' Is this not practically a limit to production? Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers.

"It is also contended here by the complainants that the consideration is executed, and, therefore, in accordance with a line of cases, the illegal nature of the original transaction will not be inquired into. The test, however, as to whether a demand con-

nected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. *Swan v. Scott*, 11 Serg. & R. 164; *Morris Run Coal Co. v. Barclay Coal Co.*, supra. Now, in this case, the bill itself sets out the agreement, prays that it may be taken as part of the bill, asks for an account, and calls upon a court of equity to enforce it. It is the very transaction, itself, complained of as illegal, that we are asked to enforce. Believing this agreement to be against public policy, we sustain the demurrers, and dismiss the bill."

John O. Bowman, Theo. P. Matthews and Furman Sheppard, for appellants. *Henry P. Brown, John K. Valentine, Joseph L. Tull, John Dolman and Samuel Gustine Thompson*, for appellees.

STERRETT, Ch. J. The conclusions of fact found by the learned court below were amply justified by the record: "It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of Philadelphia, individuals, firms and corporations, who have entered into it, to regulate and control the sale and price of beer within the city of Philadelphia and the county of Camden, N. J. It certainly is a combination in restraint of trade, tending to destroy competition and create a monopoly in an article of daily consumption." The appellants, however, conceding these to be the facts, insist that the contract was not within the prohibition of public policy, because the restraint was but partial. "Contracts in partial restraint of trade, which the law sustains, are those which are entered into, by a vendor of a business and its good will, with his vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But, in the present case, there is no purchase or sale of any business, nor any other analogous circumstances, giving to one party a just right to be protected against competition from the other. All the members of the

association are engaged in the same business within the same territory; and the object of the association is, purely and simply, to silence and stifle all competition as between its members. No equitable reason for such restraint exists. * * * *More v. Bennett*, 140 Ill. 69; 29 N. E. Rep. 888. The test question, in every case like the present, is whether or not a contract in restraint of trade exists, which is injurious to the public interests. If injurious, it is void, as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious. So, it is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, or the extent of space included, in the combination, but upon the existence of injury to the public. One combination, consisting of but part of those engaged in a given branch of trade, may amount to a practical monopoly, while another, less extensive in its scope, may, as well, bring disaster in its train. The difference lies only in degree, but equally forbids the aid of courts. In *More v. Bennett*, 140 Ill. 69; 29 N. E. Rep. 888, where a combination had been formed among some of the stenographers in the city of Chicago, Mr. Justice BAILEY said: "True, the restraint is not so far reaching as it would have been if all the stenographers in the city had joined the association; but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection. * * * We can see no legal difference between the restraint on competition which it now exercises, and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of stenographic reporters." So, no one can for a moment doubt that more serious injury would result to a densely settled than to a much larger district, with scattered population. Thus, a combination to raise the price of breadstuffs would cause serious loss in a city, while it would be comparatively harmless in an agricultural state. "We can scarcely conceive," said Mr. Justice MARR in *Oil Co. v. Adoue*, 83 Tex. 650; 19 S. W. Rep. 274, "how mere territorial limits can be the controlling test, in all instances, of the legality of the

restraints imposed upon the ordinary course of trade. The criterion may do very well when applied to the occupation or profession of one man, or even a few individuals; for neither their labor, industry, business nor services may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade in articles of prime necessity, or even of very frequent use, among a large number of persons in a given locality." *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *More v. Bennett*, 140 Ill. 69; 29 N. E. Rep. 888; *Hilton v. Eckersley*, 6 El. & Bl. 47; *Association v. Kock*, 14 La. Ann. 168; *Salt Co. v. Guthrie*, 35 Ohio St. 666; and *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, were all cases (and they show the trend of decisions in this country) in which combinations in restraint of trade were partial in respect of the number of persons implicated and territorial limits, and were yet held injurious to the public interests, and, therefore, void, as against public policy. The true test was the effect upon public interests. So, if the natural tendency of such contracts is to injuriously affect public interests, the form and declared purpose are immaterial. Courts will not lend their aid in illegal transactions, no matter how disguised. Thus, a contract entered into by the grain dealers of a town, which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination, which should stifle all competition, and enable the parties to control prices, was held void on the ground of public policy. *Craft v. McConoughy*, 79 Ill. 346. *Association v. Kock*, *supra*, is to the same effect.

The appellants insist that restraint of trade in the necessities of life, only, is within the prohibition of public policy. No standard has been furnished by which to ascertain what constitute these with reference to the general public. But, assuming that beer is not among them, it is equally within the reach of the rule. The law recognizes it as a commodity — regulates its sale; it is "an article of daily consumption;" and the court should refuse to aid in any attempted imposition upon the public by means of illegal combinations. The fact that coal was "an article of prime necessity" was not mentioned as essential to the illegality of the combina-

tion which was involved in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, but was suggested, arguendo, as an aggravation of the injury done the public. The whole course of discussion there shows that injury to the public was regarded as the true test of illegality.

Appellants also insist that "equity will not permit the fund accumulated here to be locked up forever, or dishonestly appropriated by defendants," but will compel a settlement, according to good conscience, even with a partner in an illegal transaction; a fortiori with an assignee wholly innocent of participation in, or knowledge of, the alleged illegalities. "The test, however," as was well said by the learned judge below, "is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. *Swan v. Scott*, 11 Serg. & R. 164; *Morris Run Coal Co. v. Barclay Coal Co.*, supra." "The objection," said Lord MANSFIELD in *Holman v. Johnson*, Cowp. 343, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is even allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff — by accident, if I may so say. The principle of public policy is this, 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of the law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would have the advantage of it, for, where both are equally at fault, 'potior est conditio defendentis.'" As the bill here bears upon its face the evidence of the turpitude of the transaction out of which the plaintiffs' demand arises, it is plain, upon this principle, that the court must have refused its aid, had the Enterprise Brewing Company itself been the beneficial claimant, and its

assignees stand in no higher right. Notice of the character of the combination was in the channel of the assignee's title, and hence they are not "innocent of participation in or knowledge of the illegality" of the combination, and must be treated as having taken subject to the disabilities of their assignor. *Chamberlin v. Barnes*, 26 Barb. 160; *Riddle v. Hall*, 99 Penn. St. 116. It follows that there is no error in the decree, and it should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellants. Report with opinion of court below.*

Agreements, trusts and combinations to control prices, production or supply, prevent competition or monopolize trade.—In the notes to the two preceding cases we have considered various sorts of agreements and combinations, having a tendency to prevent competition or to produce a monopoly of trade. These agreements related to the buying off of competition for the protection of the covenantee's business, the buying out of competitors, the division of territory or business between competitors, and the bona fide union of competitors in partnerships and corporations. Agreements and combinations of this sort have almost uniformly been held to be legal. The agreements and combinations embraced in this note may be divided into the following classes: (1) Trusts and combinations in the nature of a partnership, in which there is a substantial unification of the property and business of the several constituents. The property and business of each constituent is conveyed to trustees who issue trust certificates therefor. The whole is managed by the trustees as they see fit and is represented by the aggregate of trust certificates outstanding. If the constituents were individuals and firms only, there would not seem to be any legal obstacle to such a combination, so far as the common law is concerned. See note to last case. But in all cases which have come before the courts there were corporations among the constituents and they were held incapacitated to enter into such combinations. (2) Agreements and combinations in which the principal feature consists in pooling the business of all the constituents and in dividing the same, or the proceeds or profits thereof, in fixed proportions. (3) Agreements and associations which establish prices, and which may otherwise regulate the conduct of the parties in ways not objectionable, but which leave the parties free to do as much business as they can, and to enjoy the benefit thereof. There may be some cases which fall under the general heading, but which are not readily assigned to one of these classes. All the cases which involve such agreements are here given in groups by states, and a more extended examination of the questions involved and principles to be deduced therefrom is deferred to another volume.

California.—*Santa Clara Valley Mill & Lumber Co. v. Hays*, 76 Cal. 387 (1888); *Pacific Factor Co. v. Adler*, 90 Cal. 110; 27 Pac. Rep. 76 (1891); *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Pac. Rep. 581 (1891).

* Reported in 29 Atl. Rep. 102.

Illinois.—People ex rel. Peabody v. Chicago Gas Trust, (Ill.) 1 Am. R. R. & Corp. Rep. 562 (1889); More v. Bennett, 140 Ill. 69; 23 N. E. Rep. 499 (1889).

Indiana.—Cleveland, etc., R. Co. v. Closser, (Ind.) 8 Am. R. R. & Corp. Rep. 686 (1890).

Iowa.—Chaplin v. Brown Bros., 83 Iowa, 156; 47 N. W. Rep. 1074 (1891).

Kentucky.—Sayre v. Louisville Union Benevolent Assn., 1 Duvall, 148 (1863); Anderson v. Jett, 89 Ky. 375; 12 S. W. Rep. 670 (1889).

Louisiana.—India Bagging Assn. v. Koch, 14 La. Ann. 164 (1859); *State v. American Cotton Oil Trust*, 40 La. Ann. 8 (1888); Texas & Pacific R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970; 6 South. Rep. 886 (1889); Fabacher v. Bryant, 46 La. Ann. —; 15 South. Rep. 181 (1894).

Massachusetts.—Central Shade Roller Co. v. Cushman, 148 Mass. 358 (1887); Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92 (1891).

Michigan.—Richardson v. Buhl, 1 Am. R. R. & Corp. Rep. 584 (1889); Lovejoy v. Michels, 88 Mich. 15; 49 N. W. Rep. 901 (1891).

Missouri.—Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880).

Nebraska.—State v. Nebraska Distilling Co., 1 Am. R. R. & Corp. Rep. 694 (1890).

New Hampshire.—Manchester, etc., R. Co. v. Concord R. Co., 8 Am. R. R. & Corp. Rep. 22 (1890).

New Jersey.—Ellerman v. Chicago Junction Rys. & Stock Yards Co., 49 N. J. Eq. 217; 23 Atl. Rep. 287 (1891); Willoughby v. Chicago Junction Rys. & Stock Yards Co., 50 N. J. Eq. 656; 25 Atl. Rep. 277 (1892); Stockton v. Central R. Co., 50 N. J. Eq. 489; 25 Atl. Rep. 942 (1893).

New York.—Chappel v. Brockway, 21 Wend. 157 (1839); Hooker v. Vandewater, 4 Denio, 349 (1847); Stanton v. Allen, 5 Denio, 434 (1848); Clancy v. Onondaga Fine Salt Co., 62 Barb. 395 (1862); Watson v. Harlem & N. Y. Nav. Co., 52 How. Pr. 348 (1877); Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558 (1877); Live Stock Assn. v. Levy, 54 N. Y. Super. Ct. 82 (1886); Pittsburg Carbon Co. v. McMillan, 1 Am. R. R. & Corp. Rep. 583 (1890); People v. North River Sugar Ref. Co., 1 Am. R. R. & Corp. Rep. 587 (1890); DeWitt Wire Cloth Co. v. New Jersey Wire Cloth Co., 16 Daly, 529; 14 N. Y. Supp. 277 (1891); Strait v. National Harrow Co., 18 N. Y. Supp. 224 (1891); People v. Sheldon, 8 Am. R. R. & Corp. Rep. 581 (1893); Judd v. Harrington, 189 N. Y. 105; 34 N. E. Rep. 790 (1893).

Ohio.—Central Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); Emery v. Ohio Candle Co., 47 Ohio St. 320; 1 Am. R. R. & Corp. Rep. 627 (1890); State ex rel. v. Standard Oil Co., 5 Am. R. R. & Corp. Rep. 679 (1892); Field Cordage Co. v. National Cordage Co., 6 Ohio Circ. Ct. 615 (1892).

Pennsylvania.—Morris Run Coal Co. v. Barclay Coal Co., 68 Penn. St. 173 (1871); Nester v. Continental Brewing Co., ante, p. 205 (1894).

Tennessee.—Mallory v. Hanaur Oil Works, 86 Tenn. 598; 1 Am. R. R. & Corp. Rep. 637 (1888).

Texas.—Ladd v. Southern Cotton Press & Mfg. Co., 53 Tex. 172 (1880); Seeligson v. Taylor Compress Co., 56 Tex. 219 (1882); Gulf, etc., R. Co. v. State, 72 Tex. 404; 10 S. W. Rep. 81 (1888); Texas Standard Oil Co. v. Adoue, 88 Tex. 650; 19 S. W. Rep. 274 (1892); Queen Ins. Co. v. State ex rel., etc.,

8 Am. R. R. & Corp. Rep. 491 (1893); Anheuser-Busch Brewing Assn. v. Houck, (Tex. Civ. App.) 27 S. W. Rep. 692 (1894).

Wisconsin.—*National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 852; 56 N. W. Rep. 864 (1893).

Federal Courts.—*Central Trust Co. v. Ohio Central R. Co.*, 23 Fed. Rep. 806 (1885); *Dolph v. Troy Laundry Machinery Co.*, 80 Fed. Rep. 28 (1886); *American Biscuit Mfg. Co. v. Klotz*, 44 Fed. Rep. 721 (1891); *Oliver v. Gilman*, 52 Fed. Rep. 562 (1892); *United States v. Trans-Missouri Freight Assn.*, 8 Am. R. R. & Corp. Rep. 523 (1893); *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.*, ante, p. 178 (1894).

Canada.—*Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant Ch. 540 (1871).

England.—*Hearn v. Griffin*, 2 Chitty, 407 (1815); *Hilton v. Eckersley*, 6 H. & B. 47; 88 E. C. L. R. 47 (1855); *Hare v. London & N. W. R. Co.*, 2 Johns. & Hem. 80 (1861); *Collins v. Locke, L. R.*, 4 App. Cas. 674 (1879); *Mogul Steamship Co. v. McGregor*, 22 Q. B. Div. 544 (1888); 23 Q. B. Div. 598 (1889); (1892) App. Cas. 25.

The cases which are italicised only incidentally involve agreements and combinations of the sort in question, or contain dicta only, or decide nothing directly touching the validity of such agreements. In the remaining cases the agreements and combinations in question were held to be invalid, except in the following cases in which they were sustained: *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 3 Am. R. R. & Corp. Rep. 22; *Live Stock Assn. v. Levy*, 54 N. Y. Super. Ct. 32 (overruled by *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. Rep. 790); *Queen Ins. Co. v. State ex rel.*, etc., (Tex.) 8 Am. R. R. & Corp. Rep. 491; *United States v. Trans-Missouri Freight Assn.*, (C. C. A.) 8 Am. R. R. & Corp. Rep. 523; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant Ch. 540; *Hearn v. Griffin*, 2 Chitty, 407; *Hare v. London & N. W. R. Co.*, 2 Johns. & Hem. 80. As to *Mogul Steamship Co. v. McGregor*, 22 Q. B. Div. 544; 23 Q. B. Div. 598; (1892) App. Cas. 25, see note to *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.*, ante p. 178.

Cases relating to agreements and combinations between employees, or between employers, in relation to wages or other terms of employment, have not been included in the above list. Such cases are collected to some extent in the note to *Arthur v. Oakes*, post.

JACKSON ET AL. v. STANFIELD ET AL.

(Supreme Court of Indiana, February 1, 1894.)

ASSOCIATION OF RETAIL LUMBER DEALERS TO PREVENT WHOLESALERS SELLING TO CONSUMERS AND BROKERS. LIABILITY OF MEMBERS TO THOSE INJURED BY CARRYING OUT THE OBJECTS OF THE ASSOCIATION. "The Retail Lumber Dealers' Association of Indiana," by its by-laws, gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in such member's community, provided for a hearing of the claim by a com-

mittee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. Plaintiff, who was not a "regular dealer," underbid defendant on a contract, but wholesalers refused to sell to him, and he was obliged to abandon the contract, because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. Held, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff.

ACTION by Newton Jackson and Martha E. Jackson, his wife, against Howard S. Stanfield and Henry C. Dresden for damages for conspiracy to injure plaintiff's business, and for an injunction. From a judgment for defendants, plaintiffs appeal.

A. L. Brick and *L. Hubbard*, for appellants. *Andrew Anderson*, for appellees.

DAILEY, J. This is an action brought by the appellants against the appellees for damages, and for relief by injunction, on the ground that the defendants had entered into an unlawful combination for the purpose of injuring the appellees in their business, and that in consequence thereof plaintiffs had suffered actual damage and were threatened with great loss in their business. By request of the parties, the court below made a special finding of the facts and stated its conclusion of the law thereon — that the plaintiffs were not entitled to recover. There was no motion for a new trial, and the only questions presented by the record are these: First. Whether the plaintiffs are entitled to an injunction. Second. If not entitled to an injunction, are they entitled to recover damages?

It appears from the special finding that the complainants are husband and wife. Appellant Newton Jackson had no means, but his wife had some property of her own. For several years prior to the commencement of this suit, the husband had been engaged in the business of buying and selling lumber, dealing with his wife's means and also on commission, acting as a broker without owning the lumber himself. The business was managed by Jackson in his own name. He occasionally affixed the word

“agent” to his transactions. He employed from \$3,000 to \$4,000 of his wife’s money, but it was not generally known that he was acting as agent for his wife. The defendants were partners in the business of selling lumber at retail at South Bend, Ind., and for a number of years kept a lumber yard at that place. Prior to 1889 the defendants and about 150 other retail dealers in lumber organized an association, under the style name of the “Retail Lumber Dealers’ Association of Indiana,” and adopted a constitution and by-laws for its government. The constitution declares that the organization was formed “to protect its members against sales by wholesale dealers and manufacturers to consumers.” We have, for convenience, taken so much of the special finding as we deemed material to the questions involved: That the plaintiffs, Newton Jackson and Martha E. Jackson, are husband and wife. That Newton Jackson has no means, that his wife has means of her own, and for the past three years Newton Jackson has been engaged in the business of buying and selling lumber. That he has bought and sold lumber, dealing with his wife’s means, and also on commission, by negotiating sales as agent of a wholesale dealer or manufacturer, and receiving a commission therefor, without owning the lumber himself. That the arrangement between plaintiffs was that the husband supported himself and family from his earnings and profits, and if any surplus remained it was the property of his wife. That the business was managed solely by Newton Jackson, in his own name, he occasionally using the word “agent” in connection with his own name, and using from \$3,000 to \$4,000 of his wife’s means; but defendants had no knowledge that he was acting as agent for his wife. That plaintiffs have kept no lumber yard or stock on hand in South Bend, Ind., where they have done business for the past three years. That the defendants are partners, retail dealers in lumber in South Bend, Ind., and have kept a lumber yard and stock on hand. That prior to 1889 the defendants and other retail dealers in lumber in Indiana, about 150 in number, associated themselves together into an association known and designated as the “Retail Lumber Dealers’ Association of Indiana,” and agreed to a constitution and by-laws for their government, which constitution and by-laws are in these words:

“ CONSTITUTION.

“ Article 1. Title. The title of this organization shall be ‘The Retail Lumber Dealers’ Association of the State of Indiana,’ and it shall have for its object the protection of its members against sales by wholesale dealers and manufacturers to consumers, and the giving of such other protection as may be within the limits of co-operative association.

“ Article 2. Conditions of Membership. Any person who may be regularly in the retail lumber trade, owning or operating a lumber yard, in which a general assortment of stock in kind and quantity commensurate with the demands of the community where located is kept for sale, may become a member of this association by subscribing to the constitution and paying the annual dues prescribed by the by-laws. * * *

“ Article 7. When Membership shall Cease. When any member or firm shall cease to keep a regular assortment of lumber, as set forth in article 2, he or they shall cease to be members of this association. * * *

“ Article 9. Any manufacturer or wholesale dealer may become an honorary member of this association, with all privileges and benefits save that of voting, upon payment of the annual dues; provided, that all such members who may violate the rules thereof shall be immediately dropped from the rolls.

“ Article 10. Any manufacturer or wholesale dealer may become an honorary member of this association, with all the privileges and benefits save that of voting, upon payment of the annual dues. * * * Sec. 5. Members are entitled to the protection of this association in the towns in which their yards are situated and the adjacent territory, which must be designated in the application for membership, and written in the membership certificate. If protection is wanted for more than one point, where applicant owns or operates a yard, separate membership must be taken. * * *

“ Relations with Wholesalers. * * * Sec. 3. Whenever and as often as any manufacturer or wholesale dealer, or their agents, shall sell lumber, sash, doors or blinds to any person not a regular dealer, as contemplated by article 2 of the constitution of the association, any member doing business in the town to which

such shipment was made may notify the shipper, manufacturer or wholesale dealer who made such shipment that he has a claim against them for such shipment. If the parties cannot adjust the claim, it shall be the duty of the member to notify the secretary of the facts in the case, who shall refer the case to the executive committee, whose duty it shall be to hear both sides of the question and determine the claim. If the wholesaler or manufacturer refuses to abide by the decision of the executive committee, it shall be the duty of the secretary to notify the members of this association of the name of such wholesaler or manufacturer. It shall also be the duty of the members to no longer patronize said wholesaler or manufacturer. If any member continues to deal with such dealer or manufacturer, he shall be expelled from the association. If the member refuses to abide by the decision of the executive committee, his name shall be stricken from the membership of the association. It is provided that nothing in this section shall be so construed as to entitle members to make complaint on account of lumber sold to manufacturers, and actually used in articles manufactured, nor to railroads or transportation companies, nor in case of sash, doors or blinds, to hardware merchants who keep a regular stock of such goods. * * *

“Powers of Executive Committee. * * * Sec. 7. The president and secretary, ex officio, are constituted the executive committee of this association. In all matters relating to claims made by this association, between the sessions of the board of directors, the said committee shall have the same powers as those conferred upon the said board of directors. That upon request of the secretary said committee shall convene to determine and adjudicate such matters as are not clearly defined by the constitution and by-laws, or such other questions as he deems of great importance to the association. Any wholesaler not satisfied with the decisions of the secretary in cases in which demands are made upon him may appeal to the executive committee, whose decision shall be final. * * *

That said constitution and by-laws were published in May, 1888 and 1890, together with lists of active members, wholesale members and honorary members; said active members appearing to be doing business in Indiana, and wholesale and honorary mem-

bers appearing to be doing business in Indiana, Illinois and Michigan, and other states. That such publications were made in pamphlet form, and a copy of each such pamphlet was sent to every member of the association, and to all retail dealers in Indiana, and to all wholesalers and manufacturers of lumber in the United States, a list of whose names and addresses was in the possession of the secretary of said Retail Lumber Dealers' Association. That the usual course of proceedings of such association was, in case of complaint by any member against a wholesale dealer for a violation of its rules, that a hearing was had, and the person or firm charged was heard before a committee of said association; and if a penalty was assessed by such committee, and such penalty was not paid, a notice was to be sent to each member of the association upon a blank kept to be used for that purpose, which blank embraces section 3 of the foregoing by-laws; and each member is notified that —, dealer of —, (town) wholesaler, has sold a bill of lumber to some certain party who is not a regular dealer, as contemplated, and refuses to adjust the same. That said association has in this manner adjusted all claims that had come before it. That the objects of said association have thus far been made effective, and it is still in full force, and there is no probability of its discontinuance at present. That the defendants, Stanfield & Dresden, have been members of said association for the past three years, and the defendant Stanfield became a director of said association at its December meeting in 1889 for a term of two years, and is still such director. That in October, 1889, the Birdsell Manufacturing Company, of South Bend, Ind., desired to purchase a large bill of lumber, and Newton Jackson and the defendants were competitors in the sale of such lumber, and said Jackson was successful in making such sale, and, acting as a broker, bought such bill of lumber of the West Michigan Lumber Company, of Woodville, Mich., and the said bill of lumber was shipped directly by the West Michigan Lumber Company to said Birdsell Manufacturing Company, and a commission of such sale was paid by said West Michigan Lumber Company to Newton Jackson. That defendants thereupon wrote and sent to said West Michigan Lumber Company the following letter: "South Bend, Ind., Oct. 28th, 1889. West Michigan Lumber Co., Woodville, Mich.—Gentlemen: We have bought

lumber of your house for a number of years past, and considered you an honorable, upright company, doing a strictly wholesale business, but recently we are informed that you have infringed upon the laws of the Lumberman's Association of the State of Indiana, by selling to a consumer in this city a large bill of lumber, thus coming in competition with ourselves in the retail trade. We trust that you can satisfactorily explain this matter, and we will not be obliged to lay it before the state board. We refer to the Birdsell bill. Yours, etc., Dresden & Stanfield." To which letter the West Michigan Lumber Company sent the following answer: "Woodville, Mich., Oct. 31st, 1889. Dresden & Stanfield, South Bend, Ind.—Gentlemen: Replying to your letter of the 28th, the bill to which you refer was sold through a regular dealer in your city, and he was paid his commission. Yours, truly, West Michigan Lumber Co." To which letter defendants replied as follows: "South Bend, Ind. Nov. 5th, 1889. West Michigan Lumber Co., Woodville, Mich.—Gentlemen: Your favor of October 31st received. Contents noted. We are credibly informed that your house sold the Birdsell bill to Newton Jackson of this city. According to article 2 of the constitution of the Retail Lumber Dealers' Association of Indiana, Newton Jackson is not a regular dealer. There is and has been for the past year too much encroaching by wholesalers upon the natural and acquired rights of retailers. Consequently, you should not think us impertinent upon insisting that you give us the name of the regular dealer to whom you sold the bill for Birdsell's use. We are determined to sift this matter to the bottom. Yours, etc., Dresden & Stanfield." And said West Michigan Lumber Company replied as follows: "Woodville, Mich., Nov. 8th, 1890. Messrs. Dresden & Stanfield, South Bend, Ind.—Gentlemen: Replying to your letter of the 5th, we sold the bill mentioned through Mr. N. Jackson. As he bought the lumber from us we supposed he was a regular dealer. We do not intend to sell except through a regular dealer, and so supposed when the order was accepted. Yours, truly, West Michigan Lumber Company." And then, on November thirteenth, the defendants sent the following letter to said West Michigan Lumber Company: "South Bend, Ind., Nov. 13th, 1889. West Michigan Lumber Co., Woodville, Mich.—Gentlemen: Yours of the 8th is before us.

Ignorance of the law is no justification. N. Jackson has not now, nor has he had for at least three years, either office or yard at South Bend. He has been and is a notorious scalper. We demand of you one hundred dollars (\$100.00) on account of the Birdsell bill. If you refuse the demand we shall refer our claim to Retail Dealers' Association of Indiana, of which you are honorary members, and discover if it has a power in the land, or merely the hollow mockery of a resounding name. Yours, etc., Dresden & Stanfield." That the West Michigan Lumber Company thereupon sent the following letter to defendants: "Woodville, 11, 19, '89. Dresden & Stanfield, South Bend, Ind.—Gentlemen: Yours of the 13th inst. at hand. In regard to that demand for one hundred dollars (\$100.00) on account of Birdsell Mfg. Co.'s bill, we shall have to respectfully decline for that reason. If you or the dealers of South Bend sold the Birdsell Manufacturing Company one-half or most of the white pine lumber they bought, it would be different, but they write that they bought from the wholesale trade over one million feet per year, and did not buy over five thousand feet from the concerns there. Now, it does not look to us that you should have any claim against this company. If you have, there are others in the same fix as us, and you should make claim on all. We have always been very particular not to interfere with the retail trade, and in the past ten years have had no complaint. Hoping you will look into the matter fully before making complaint, I am yours, truly, E. B. Wright, President." That these defendants wrote and sent the following letter to W. B. Allen, secretary of said association, at Indianapolis, Ind.: "South Bend, Ind., Nov. 22, 1889. To the Executive Committee of the Retail Lumber Dealers' Association of Indiana—Gentlemen: We herewith enclose correspondence, and submit to you our claim against the West Michigan Lumber Company, of Woodville, Michigan. About two months ago, the Birdsell Manufacturing Company, of South Bend, wishing to enlarge their factory, gave us a bill of material to figure on, consisting of joists, timbers, flooring and boards, amounting to 326 M feet, with privilege of increasing 400 M feet, which was afterwards done. The West Michigan Lumber Company got the contract through Newton Jackson, a man without an office or yard, who the railroad companies would not trust one day for freight, really a buyer for

the Birdsell Manufacturing Company. The West Michigan Lumber Company shipped direct to Birdsells. Mr. Wright, in his favor of the 19th, claims that the Birdsells purchased a million feet of lumber every year of the wholesalers, and not five M feet of the retailers; but he fails to state that this million feet is for manufacturing wagons and clover hullers. There are no more complete stocks carried in Indiana, outside of Indianapolis, than are ours. There are two other yards in our city nearly as complete. Why do buyers go away from here to buy? Because they can get cheaper from wholesalers than from home concerns. In this case the West Michigan Lumber Company undoubtedly sold the lumber to the consumers cheaper than they quoted it to us. We and our predecessors in this location have for years done business with the West Michigan, the last purchase slightly over two months ago. We have never had any trouble, always finding them honorable and upright. We entertain no malice against the company, but we do insist that, as members of the Retail Lumber Dealers' Association, we are entitled to our claim against the West Michigan Lumber Company, who are honorary members of the same association, and if there is any strength in the association we will be righted. If the association cannot enforce its laws, the sooner it gives up the ghost the better. Yours, truly, Dresden & Stanfield."

That thereafter a hearing of such claim was had before a committee of said association at Indianapolis in December, 1889, and said committee found that the said claim of defendants against the West Michigan Lumber Company was valid. And on February 20, 1890, W. B. Allen, secretary of the association, wrote and sent the following letter to said West Michigan Lumber Company: "Indianapolis, Ind., Feb. 20th, 1890. W. B. Wright, Esq., Pres't West Michigan Lumber Co.—Dear Sir: January 27th I wrote your Mr. J. S. Wright that the final decision in regard to South Bend matter was that claim of Dresden & Stanfield is valid, and they are entitled to redress. I wrote J. S. Wright, as he seemed to have the settlement of the claim in his hands; but, as I have had no reply since I wrote him, will you kindly advise me what your final answer is in regard to this? I inclose copy of letter of January 27th. Yours, truly, W. B. Allen, Secretary." And on April 14, 1890, said West Michigan Lumber Company

wrote and sent the following letter to said secretary : " Woodville, Mich., April 14th, 1890. W. B. Allen, Esq., Sec'ry Retail Lumber Dealers' Association, Indianapolis, Ind.—Dear Sir: Your favor of the 10th at hand. Please make a full statement of the claim and demand of Dresden & Stanfield ; also a statement that the claim was allowed by the Retail Lumber Dealers' Association on the grounds that the West Michigan Lumber Company could sell lumber direct to the Birdsell Mfg. Co., but when sold through N. Jackson they must pay damages, which we believe is correct. Yours, truly, West Michigan Lumber Co." To which said secretary replied as follows: " Indianapolis, Ind., April 17th, 1890. West Michigan Lumber Co., Woodville — Gentlemen: In regard to complaint of Dresden & Stanfield, would say that above-named firm filed a complaint against your company for selling lumber to party or parties that are not dealers, or who are entitled to buy lumber of a wholesaler or manufacturer. This claim was investigated by the executive board of Retail Lumber Dealers' Association. Your firm was allowed representation during the investigation. Your letters also admitted the sale ; and, while we thought and still think it was your intention to make the sale through a bona fide dealer, still the facts go to prove, and are admitted by yourself, that it was not sold through a regular dealer, and the board had no alternative but to find in accordance with the rules of the association. The Birdsell Mfg. Co. had nothing to do with the case, and we have not been called on to decide whether you have the right to sell Birdsell Mfg. Co. or not. The plain facts are you sold this bill to N. Jackson, which was so stated in your own correspondence. Mr. Jackson is not a lumber dealer, as defined by our rules, namely, a person or firm who carry a stock adequate to the market where he or they are located. We submit to your own judgment that we are forced to deny Mr. Jackson's right to buy lumber of any one that he pleases, and throw down all the bars, as he could then sell to any one, and we would have no way of reaching him. Mr. Jackson's class is one that does more injury to the yards of this country than any that we have to deal with. Very truly, W. B. Allen, Secretary."

That, therefore, on April 30, 1890, the West Michigan Lumber Company sent its draft for \$100 to said Retail Lumber Dealers' Association of Indiana, and said sum was by said association

passed over to defendants in payment of said claim against the West Michigan Lumber Company, which sum was paid and received as a penalty for a violation of the rules of said association in the sale of the Birdsell bill of lumber through N. Jackson. That, therefore, the said West Michigan Lumber Company, and Morton, Lewis & Co., of Grand Rapids, Mich., refused to sell lumber to said Newton Jackson for the reason that said West Michigan Lumber Company and said Morton, Lewis & Co., who were wholesale dealers and manufacturers of lumber, were afraid of penalty for violation of the rules of said association. That said Newton Jackson made an offer to the Studebaker Bros. Manufacturing Company of South Bend, to sell 2,000,000 feet of lumber to said company, which offer was based on the price lists of said West Michigan Lumber Company, and said Jackson could not obtain said lumber of any other firm as cheaply and conveniently as from said West Michigan Lumber Company. That his commission therein would have been \$500. That the offer of said Jackson was accepted by said Studebaker Bros. Manufacturing Company, but the West Michigan Lumber Company refused to sell to or through said Jackson by reason of the rules of said association, and on account of having paid said penalty, and said Jackson thereupon did not contract with said Studebaker Bros. Manufacturing Company, but turned over such sale to said West Michigan Lumber Company, and allowed said company to make such sale without paying any commission to him. That the market from which dealers in South Bend, Ind., can best and most cheaply buy lumber of wholesalers and manufacturers, to resell to consumers, is in the state of Michigan, and said Jackson could most cheaply and profitably buy lumber and sell on commission by dealing with wholesale dealers in Michigan, and most cheaply and profitably buy of the West Michigan Lumber Company to resell on commission. That said Newton Jackson thereafter caused lumber to be purchased for his customers in the name of Smith & Jackson, a firm of regular dealers, as defined by said association, in South Bend, and paid to Smith & Jackson a share of his commission for the use of their names by an agreement with them, and paid to them for that purpose the sum of eighty-three dollars, which sum was a fair charge for the use of their names. That by reason of the refusal of the said West

Michigan Lumber Company to sell him lumber to fill an existing contract, said Jackson went to Manistee, Mich., to purchase lumber, and expended in railroad fare and freight eighty-two dollars more than it would have cost him had the West Michigan Lumber Company not refused to sell to him. That, except for such refusal, the West Michigan Lumber Company could have sold him lumber to fill such contract. That during the year 1890 plaintiff's business has decreased. That before the commencement of this suit plaintiffs requested of defendants to permit plaintiffs to do business as heretofore, and to abandon their position in this matter, and not to complain to said association of sales made to plaintiffs, but defendants refused to, and declared their intention to adhere to their position, and that they intend to enforce the rules and by-laws of said association. That defendants and the West Michigan Lumber Company, prior to and at the time of the happening of the matters in controversy aforesaid, were members of said association — defendants as active members, said company as an honorary member — and both defendants and said West Michigan Lumber Company knew its purposes and objects.

We infer from article 2 of the constitution that "any person in the retail lumber trade, owning and operating a lumber yard in which a general assortment of stock in kind and quality commensurate with the demands of the community where located is kept for sale, is a regular dealer." The regular dealer, in accordance with the provisions of section 3 of the by-laws, when his territory is encroached upon by a wholesale dealer or manufacturer, is authorized to notify the person so offending that he has a claim against him for such sale or shipment, and to make a demand therefor. If the parties cannot adjust it, it is made the duty of the member to notify the secretary of the facts in the case, who shall refer the matter to the executive committee, whose duty it is to hear the grievances and determine the claim. If the wholesaler or manufacturer ignores the decision of the committee, it is the duty of the secretary to notify the members of the association of the name of the person so offending, and of the members to no longer patronize him. If they continue to deal with the offender they shall be expelled from the association; and if any

member refuses to abide by the decision of the executive committee, his name is to be stricken from the membership of the society. The facts found by the court disclose that the appellees, as members of the combination complained of, availed themselves of the means provided for in section 3 to destroy the business of the appellants as brokers in lumber, because they were not retail dealers within the definition of the term, and that they effectuated their purpose. The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer and compel him to pay an arbitrary penalty under a threat of financial injury, and they force him to assist in ruining the dealer who does not own a yard. There is such an element of coercion and intimidation in the by-law under consideration, towards the wholesale dealers, manufacturers and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was optional with the wholesale dealer whether it would pay the demand or not, or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association. A conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business, or to injure the business of any one, by wrongfully preventing those who would be customers from buying anything from the representatives of such business by threats or intimidation, is in restraint of trade and unlawful. Under a statute of Massachusetts, "a combination to restrain trade so as to impoverish a man in his business is indictable." 4 Am. & Eng. Ency. of Law, 608, citing note 3. On the same page it is said: "The labor and skill of the workman, the plant of the manufacturer and the equipment of the farmer are, in an equal sense, property. Every man has a right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence, or a species of intimidation that works upon the mind. While the law accords this liberty to one, it accords a like liberty to another, and all are bound to use and enjoy their own liberties

and privileges with regard to those of their neighbors." In *People v. Petheram*, 64 Mich. 252; 31 N. W. Rep. 188, it is said: "No one is authorized to unlawfully destroy or hinder the lawful business of another for the purpose of helping himself." In 1 Hawk. P. C. chap. 72, § 2, it is laid down that "all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law." The same proposition, in various forms of expression, is declared in a long list of authorities cited in 4 Am. & Eng. Ency. of Law, 609; so that, as the author states it, "we are compelled to forsake the literature of doubt, and to cleave unto that of authority." It is held in *State v. Stewart*, 59 Vt. 273; 9 Atl. Rep. 559, that "such conspiracies may give the individual directly affected by them a private right of action for damages." In *Walker v. Cronin*, 107 Mass. 555-564, it is said that "every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of the like rights by others, it is *damnum absque injuria*." In *Carew v. Rutherford*, 106 Mass. 14, it is said: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. * * * He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without any unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions." And in *Com. v. Hunt*, 4 Metc. (Mass.) 134, SHAW, Ch. J., declares that the legality of such association will depend upon the means to be used for the accomplishment of its objects, and whether they be innocent or otherwise. In *More v. Bennett*, 140 Ill. 69; 29 N. E. Rep. 888, the court held that a combination or conspiracy entered into by a stenographic association, by which the prices of reporting legal proceedings by shorthand are to be kept up by the prevention of competition, although such association may embrace but a comparatively small part of the reporters engaged in the business, but which is open for the admission of all reporters who

may be induced to join, and by which a schedule of prices is fixed, and by which any member violating its rules as to prices is subject to a fine, is void, as tending to prevent a free and unrestricted competition in business. In *Lovejoy v. Michels*, 88 Mich. 15 ; 49 N. W. Rep. 901, the court held that, where the price of goods is not agreed upon at the time of the sale, the law implies an understanding to pay what the commodity is reasonably worth ; “ that a price arbitrarily fixed by a combination of manufacturers or dealers is not competent evidence to show a reasonable price for the goods sold by the members of the combination ; that such combinations are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute that of unconscionable gain, whereby the participants become enriched at the expense of the consumer, beyond what he ought to pay under a healthy spirit of competition in the business community. The effect of such combinations is the same as that in restraint of trade, and public policy places its reprobation alike upon both. Combinations to control prices are against public policy and void, because they have a mischievous tendency, and are injurious to the best interests of the state, which require that all legitimate business shall be open to competition, that the current price of commodities shall be controlled by the law of supply and demand, and that the laws of commerce shall flow in their accustomed channels, and not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties.”

In *Oil Co. v. Adoue*, 83 Tex. 650 ; 19 S. W. Rep. 274, the court held that “ every producer or vendor of ” commodities “ has the right to use all legitimate efforts to obtain the best price for the articles in which he deals, but when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more pernicious than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour or other industrial commodities, might be artificially raised to a ruinous extent, far exceeding any naturally resulting from the proportion between supply and demand.” In *Greenh. Pub. Pol.*

651, the rule is thus stated: "They may combine for the purpose of obtaining a benefit for themselves, which by law they can claim; but a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another." In *Delz v. Winfree*, (Tex. Sup.) 16 S. W. Rep. 111, the defendants were wholesale dealers in slaughtered meats, and combined to refuse to sell meat to the plaintiff, a butcher. This was not sufficient, but the petition also alleged that the defendants also induced another dealer in slaughtered meat to likewise refuse to sell to the plaintiff. It was held that such interference with his business was a cause of action, and it was error to sustain a demurrer to the petition. In *Murray v. McGarigle*, 69 Wis. 483; 34 N. W. Rep. 522, the complaint alleged a conspiracy to control the coal trade in Milwaukee, Wis., and, as a result, an injury to plaintiff in his business and reputation. The complaint is set out in full, and held good for civil damages. In *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669; 12 N. E. Rep. 825, the latter threatened plaintiff's customers with suits for infringement of its patents, depreciated its oil, etc. The object was to drive plaintiff out of business. It was held that the Standard Oil Company was liable for damages. The great weight of authority supports the doctrine that, where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere passive, let alone policy, a withdrawal of all business relations, intercourse and fellowship that creates the liability, but the threats and intimidation shown in the complaint. The learned counsel for the appellees, in his very able brief, contends that the plaintiffs were only incidentally injured by the acts of the defendants in enforcing a penalty of \$100 against the West Michigan Lumber Company. It will be observed that the Retail Lumber Dealers' Association invites wholesalers to become honorary members, and that said lumber company is an honorary

member. But the rules of the association do not affect alone members active and honorary. They extend to and reach any wholesale dealer in the United States with whom the threat to withdraw the trade of 150 retail dealers can have weight. It is shown in the finding that Michigan is the source from which most of the lumber in northern Indiana is procured, and that the rules of the association are published in pamphlet form and sent to every wholesale dealer in the United States. The retail dealers who organized the association in question are members of the various cities and towns where they are located. They have lumber yards containing stock in quantity and quality suited to and commensurate with the wants of the consumers in their several localities. These gentlemen are prominent, wealthy and influential citizens of our state, whose power, from the elevated stations they occupy, so exercised, enables them to control the wholesale dealers of the United States against the agents and brokers within their own territory, and effectually drive them out of business. It is idle to say that the victim of such a combination is only "incidentally" affected thereby. The object of the association and the result attained is a monopoly of the trade by owners of yards, and the broker is simply ignored by the wholesale dealers. It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves. This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may and do sometimes become honorary members, so as to keep within touch of the retail dealers and secure trade. It is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers, and the wholesalers must obey or lose their trade. It is found as a fact that the market in which the plaintiffs could most profitably buy was in Michigan. Freight and railroad facilities necessarily limited the field. It is also found that the West Michigan Lumber Company is the dealer that made the plaintiffs' trade most profitable, and that, for fear of the penalties, this company and another refused to deal with them. The West Michigan Lumber Company was willing and anxious to sell to the plaintiffs until fined by the defendants and mulcted in the sum of \$100, when it refused to make further sales for the reason that it was afraid of the penalties. Such rules contravene the

rights of non-members to earn their living by fair competition. The case of Bohn Manuf'g Co. v. Hollis, decided by the Supreme Court of Minnesota July 20, 1893, which will be found in 55 N. W. Rep. 1119, is cited by appellees as sustaining the decision of the lower court. It was a case in which a large number of lumber dealers had formed an association very similar in its character to the one in the case at bar. The plaintiff had made a sale of lumber directly to a consumer, and the secretary made a demand upon him for the penalty as provided in section 3 of the by-laws. The plaintiff delayed and evaded payment so long that defendants threatened to send all the members of the association the lists of notices provided for by section 6 of the by-laws, informing them that the plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon the plaintiff commenced his action for a permanent injunction, and obtained ex parte a temporary one, enjoining the defendants from issuing these notices, etc. The appeal was from an order refusing to dissolve the same. On appeal, the court found that the action would not lie, and that the injunction should be dissolved, although the defendants were demanding and seeking to recover the penalty, by threats, and if these notices should be issued, the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits. The opinion proceeds upon the theory that there was no element of coercion or intimidation in the acts complained of, but we think the decision in this respect is in conflict with approved authority, and is bad as a precedent.

It appears from the facts found by the court that, after the payment of the \$100 fine so assessed, the appellant Newton Jackson made an offer to the Studebaker Bros. Manufacturing Company, of South Bend, to sell said company 2,000,000 feet of lumber, which offer was based on the price list of the West Michigan Lumber Company; that his commission thereon would have been \$500; that the offer of said Jackson was accepted by the Studebaker Bros. Manufacturing Company, but the West Michigan Lumber Company refused to sell to or through Jackson by reason of the rules of said association, and on account of having paid said penalty, and said Jackson thereupon did not contract with said Studebaker Bros. Manufacturing Company, but turned

over such sale to the West Michigan Lumber Company, and allowed it to make such sale without paying any commission to him; that said Newton Jackson thereafter caused lumber to be purchased for his customers in the name of Smith & Jackson, a firm of regular dealers as defined by the association, in South Bend, and paid to them eighty-three dollars of his commission for the use of their name, which was a reasonable and fair charge therefor; that by reason of the refusal of the said West Michigan Lumber Company to sell him lumber to fill an existing contract, said Jackson went to Manistee, Mich., to purchase lumber, and expended in railroad fare and freight eighty-two dollars more than it would have cost him had said West Michigan Lumber Company not refused to sell to him; that, except for such refusal, the West Michigan Lumber Company could have sold him lumber to fill such contract; that during the year 1890 plaintiffs' business had decreased, and before the commencement of this suit plaintiffs requested defendants to permit them to do business as heretofore, and to abandon their position in this matter, and not to complain to the association of sales made to plaintiffs, but defendants refused to do so, and declared their intention to adhere to their position, and that they intended to enforce the rules and by-laws of said association.

Without further extending this opinion, we only need to say that, if it had not been for the wrongful acts of the appellees, the plaintiffs would have made \$583 in profits upon contracts of which they were deprived. They are entitled as compensation to the amount of damages sustained, which is measured by the loss actually incurred. If there was any circumstance to be considered in mitigation of damages, it was incumbent on the defendants to show that fact; but as the record is silent on this question we must infer that none existed. We think the claim for expenses to Manistee and return too remote to be considered in this case. The judgment is reversed, with instructions to restate conclusions of law and render judgment upon the special findings in favor of the appellants for \$583, and with the further instruction to render a judgment perpetually enjoining the defendants from in any way, other than fair, open competition, interfering with the plaintiffs in their business, and from demanding a penalty or making a claim against any one, under the

by-laws of said association, who may sell to the plaintiffs or through them to a consumer.

HOWARD, Ch. J., took no part in this decision.*

Trade and labor associations — when the objects or acts thereof are unlawful, so as to render the same or the members thereof liable to an action by those damaged thereby.— Leading cases upon this subject are *Bohn Mfg. Co. v. Hollis*, (Minn.) 8 Am. R. R. & Corp. Rep. 515; *Cote v. Murphy*, (Penn.) 9 Am. R. R. & Corp. Rep. 610; *Mogul Steamship Co. v. McGregor*, 22 Q. B. Div. 544; 23 Q. B. Div. 598; (1892) App. Cas. 25.

The constitution of an association of retail dealers provided that: "Whenever an account against any person shall have been listed in the abstract of unsettled accounts issued by our general association, or certified to the secretary of this branch by said association as unsettled, no member shall, in any case, open an account, without security, with such delinquent; and the opening of such account by any member with such person shall be considered a misdemeanor, and subject such member to an investigation by the executive board, and, if found guilty, he shall pay to said board a fine of twenty dollars, for the sole use and benefit of this branch, and his neglect or refusal to comply with this demand shall make him liable to expulsion from said association." In an action for damages against one of the members of said association by an alleged delinquent, against whom a claim had been by the defendant procured to be listed, held, that the defendant thereby rendered himself liable for all damages sustained by the plaintiff by reason of said listing and the publication of his alleged delinquency, whether such damage was owing to a technical libel or to the refusal of members of said association to extend credit to plaintiff because of the provision above quoted in relation to listing and publication. *Masters v. Lee*, (Neb.) 58 N. W. Rep. 222.

Wholesale butchers, to protect each other from dishonest and insolvent customers, and otherwise mutually to assist each other, may agree that each, on the request of the other, will refuse to sell merchandise to any butcher indebted to them both, and such butcher cannot recover for consequent injury to his business. *Delz v. Winfree*, 80 Tex. 400; 16 S. W. Rep. 111; *Delz v. Winfree*, (Tex. Ct. Civ. App.) 25 S. W. Rep. 50. But where the defendants also induced a third party not to sell to the plaintiff, and such inducement was not made to serve any legitimate purpose of their own, the interference with the plaintiff's business is unlawful and defendants will be liable for the damages resulting. *Delz v. Winfree*, 80 Tex. 400; 16 S. W. Rep. 111.

See, also, *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, and cases cited in note to *Bohn Mfg. Co. v. Hollis*, 8 Am. R. R. & Corp. Rep. 515, 511.

* Reported in 86 N. E. Rep. 345.

CHICAGO, B. & Q. R. Co. v. JONES.

(Supreme Court of Illinois, April 2, 1894.)

1. RAILROAD COMPANIES. STATE REGULATION. VALIDITY OF ACT IMPOSING A PENALTY FOR THE EXACTION OF MORE THAN FAIR AND REASONABLE RATES. Section 1 of the act of Illinois of May 2, 1873, which declares that any railroad company which shall charge or receive more than a fair and reasonable compensation shall be guilty of extortion, is not void for uncertainty in defining the offense, because the section is merely declaratory of a well-known principle of the common law, and the courts will decide what is a reasonable rate as controversies arise, and because, when construed in connection with the 8th section, which provides for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each railroad in the state, it furnishes a uniform rule for the guidance of the railroads.

2. THE LEGISLATURE MAY AUTHORIZE COMMISSIONERS TO FIX RATES WHICH SHALL BE DEEMED PRIMA FACIE FAIR AND REASONABLE. The provisions of section 8 of said act which authorizes the commissioners to establish schedules of reasonable maximum rates of charges for the transportation of freight and passengers, and requires that the same shall be received as prima facie evidence that the rates therein fixed are reasonable, is not void as a delegation of legislative power, since it does not clothe the commissioners with the legislative discretion of fixing rates that shall be deemed absolutely reasonable, but only of fixing rates that shall be received as prima facie reasonable.

3. The provision making the commissioners' schedule prima facie evidence of the reasonableness of their rates is not unconstitutional, as depriving the carriers of their property without due process of law, or as infringing on the right of trial by jury, since it simply prescribes a rule of evidence, and does not deprive the carriers of their right to a judicial determination of the reasonableness of the rates.

4. CONSTITUTIONAL LAW. SEPARATION OF VALID AND INVALID PROVISIONS OF ACT. The provisions of said act in regard to fixing rates of transportation in the state, so as to prevent extortion by the carriers, are so distinct from those forbidding unjust discrimination between different shippers that the former are not affected by any question as to the unconstitutionality of the latter, as interfering with interstate commerce.

5. CHARTER PROVISIONS HELD INSUFFICIENT TO EXEMPT COMPANY FROM STATE REGULATION OF RATES. The provision of the act of May 2, 1873, empowering the commissioners to establish rates, is binding upon a railroad company organized under the law of June 19, 1852, which authorizes the company to make such by-laws as may be expedient, provided they are not repugnant to the laws of the state, since such proviso includes laws thereafter passed.

6. PROOF OF SCHEDULE OF RATES ESTABLISHED BY COMMISSIONERS. Under the act of June 30, 1885, which declares that all such schedules of rates theretofore or thereafter made shall be received as prima facie schedules of the commissioners, without further proof than the production of the schedule desired to be used as evidence, with a certificate of the commissioners that the

same is a true copy of a schedule prepared by them, such a copy is admissible without proof of the publication of the schedule.

7. LIMITATIONS. AMENDMENT. EXTORTION UNDER STATUTE AND UNDER COMMON LAW ARE DISTINCT CAUSES OF ACTION. Where a declaration declares on the statutory liability of a railroad company for treble damages for extortionate freight charges, an amendment thereto claiming damages for violation of its common-law duty of making only reasonable charges, introduces a new cause of action.

THIS was an action in debt, brought by appellee, Charles L. Jones, against appellant, the Chicago, Burlington and Quincy Railroad Company, under the act of 1873, to recover penalties for alleged overcharges on shipments of live stock from points on appellant's road in this state to the Union Stock Yards, Chicago.

The suit was brought in the Circuit Court of Knox county on October 17, 1882. On May 25, 1883, appellee filed a declaration consisting of two special counts. The first count alleged that the railroad and warehouse commissioners made and published prior to October 2, 1873, as required by law, a schedule of reasonable maximum rates for appellant; that appellee shipped over appellant's road, subsequent to that date, certain cars of live stock from certain points on its road to Chicago; that appellant charged and received from appellee certain rates of freight which were in excess of the rates fixed in the commissioners' schedule, whereby, by force of the statute, an action accrued to appellee to recover three times the amount of the overcharge and a reasonable attorney's fee. The second count was the same in form, except that it alleged a second schedule made and published by the commissioners prior to December 2, 1881, and certain shipments made and freights charged and received in excess of the commissioners' rates subsequent to that date. On June 9, 1893, appellant filed four pleas to the declaration. The first two pleas set out at length the corporate organization of appellant, and the several special charters of the different companies forming it by consolidation; that by these charters appellant was given power by the legislature to fix its own rates of freight and fare, and that the statute under which the suit was brought was in violation of the obligation of the contract between it and the state. The third plea was nil debet, and the fourth that the cause of action did not accrue within two years. On June 11, 1883, the cause was removed to the Circuit Court of the United States, but on

September 8, 1890, was remanded and redocketed in the state court. In February, 1891, appellee filed an amended declaration which consisted of 191 special counts. All of these counts except the last declared on single shipments on different dates and were the same in form. Each of the first 124 counts averred the making and publication by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for appellant prior to October 2, 1873 — the rate fixed by the schedule — the rate charged, and the excess, and that thereby, by force of the statute, a cause of action accrued to the plaintiff for three times the alleged overcharge and an attorney's fee. The remaining counts, except the last, were the same in form, except that they averred the making of a second schedule prior to December 2, 1881, and shipments subsequent to that date. The last count did not count on the statute, but averred certain shipments, and that the rates charged and received were unreasonable, and that thereby the defendant became indebted to appellee for the alleged overcharge above a reasonable rate. To this declaration appellee filed seven pleas. The first and second, to all the counts except the last, set up appellant's charters, and the right claimed by it to fix its own rates, and that the statute sued on was a violation of the obligation of its contract with the state, substantially as in the first and second pleas to the original declaration. The third plea was nil debet. The fourth and seventh pleas, to all the counts except the last, averred that the causes of action alleged did not accrue within two years before the commencement of the suit. The sixth plea averred that the cause of action set out in the last count did not accrue to the appellee within five years before the filing, or obtaining leave to file, that count. Appellee joined issue on the third, fourth and seventh pleas, and filed a demurrer to the first, second and sixth pleas, the fifth having been withdrawn. The demurrers raised two questions: (1) Whether appellant's first and second pleas, setting up its charter provisions, constituted a defense; and (2) whether the cause of action set up by the last additional count was a different cause of action from that declared on in the original declaration. The court sustained appellee's demurrer to the first and second pleas, and overruled his demurrer to the sixth. Issues were subsequently joined, and a trial was had by a jury. On the trial appellee gave evidence showing the various shipments

made by him for two years prior to the commencement of the suit, and the amount of freight paid on each, and to establish that the rate charged was more than a reasonable rate, and the alleged overcharges, and gave in evidence (1) a schedule of maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated September 1, 1873, consisting of a classification of freight, and a tabulation of rates referring to this classification, with a certificate of the railroad and warehouse commissioners attached, as to the dates of publication; (2) a like schedule of reasonable maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated December 1, 1881, also having a certificate of the railroad and warehouse commissioners attached, as to the dates of publication. To the admission of these schedules in evidence, appellant objected, on the grounds, among others, (1) that the statute on which the suit was brought was unconstitutional and void; (2) that the provision of the statute making the commissioners' schedule prima facie evidence of reasonable maximum rates was unconstitutional and void; (3) that the schedule was not published as required by the statute, and, therefore, never went into effect as a schedule. Among the instructions asked by appellant, and refused by the court, were (1) an instruction that, under the pleadings and evidence, the plaintiff was not entitled to recover; (2) an instruction that in arriving at their verdict the jury should disregard the schedule of September, 1873; (3) an instruction that in arriving at their verdict the jury should disregard the schedule of December, 1881. The jury rendered a verdict in favor of appellee for \$2,868.60, and the court subsequently assessed appellee's attorney's fee at \$1,200. A motion for a new trial was entered and overruled, and judgment was rendered in favor of appellee for the amount of the verdict, and costs. From this judgment appellant has appealed to this court.

Herrick & Allen, for appellant. *J. B. Cessna* and *Willoughby & Barnes*, for appellee.

MAGRUDER, J. (*after stating the facts*). The questions presented by this record concern the validity of the system under which, for twenty years or more, the rates of railroad charges for

the transportation of passengers and freight have been controlled and regulated by this state, through the medium of a board of railroad and warehouse commissioners. The principal points raised by the demurrers to the pleas, by the objections to the introduction of evidence, and by the refusal of instructions, relate to the constitutionality of the act of the legislature of this state, approved May 2, 1873, in force July 1, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freights on said roads,' approved April 7, A. D. 1871." 2 Starr & C. Ann. St. 1961; Rev. St. 1885, chap. 114, p. 1167, §§ 110-119. Section 1 provides: "If any railroad corporation," etc., "shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers and freight * * * the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided." Section 6 provides: "If any such railroad corporation shall, in violation of any of the provisions of this act, ask, demand, charge or receive of any person or corporation any extortionate charge or charges for the transportation of any passengers, goods, merchandise or property, * * * the person or corporation so offended against may, for each offense, recover from such railroad corporation, in any form of action, three times the amount of the damages sustained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court," etc. Section 8 is as follows: "The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freights, and cars on each of said railroads; and such schedule shall, in all suits brought against such railroad corporations wherein is in any way involved the charges of any such railroad corporation for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, be

deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freight and cars, upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks in some public newspaper published in the city of Springfield in this state. All such schedules heretofore or hereafter made, purporting to be printed or published as aforesaid, shall be received and held in all such suits as prima facie evidence of the schedules of said commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named, and that the same has been published as required by law, stating the name of the paper in which the same was published, together with the date of such publication."

1. The first ground upon which counsel for appellant attack the act is that it is void for uncertainty, in not defining the offenses for which the penalties provided for are imposed. The basis of this attack is found in the words: "If any railroad corporation," etc., "shall charge," etc., "more than a fair and reasonable rate," etc. It is said that it is uncertain what a fair and reasonable rate is, as the determination of that question will depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability, as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.; that the offense of charging more than a fair and reasonable rate can only be defined when the jury, in each particular case, shall decide from the evidence before them what is a fair and reasonable rate; that the statute, being penal in its character, should describe the offense in terms which are free from ambiguity; and that the enforcement of a statute

whose meaning is thus doubtful violates that provision in the Federal and State Constitutions, which declares that no person shall be deprived "of life, liberty or property without due process of law." Const. U. S. amend. art. 14, § 1; Const. Ill. art. 2, § 2. The difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. If the legislature, in the act passed by it, fixes particular rates or charges, strict compliance therewith may work hardship, in view of the impossibility of always providing in advance for the effect of varying circumstances and conditions. The 1st section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (*Messenger v. Railroad Co.*, 36 N. J. Law, 407; *New England Express Co. v. Maine Cent. R. Co.*, 57 Maine, 188), and the court was to judge of the reasonableness of the freight charges. *Gard v. Callard*, 6 Maule & S. 70; *Lowden v. Hierons*, 2 Moore, 102; *Baxendale v. Railway Co.* 5 C. B. (N. S.) 330. As common carriers must carry all freight offered to them, and can only make a reasonable charge for so doing, it follows that the statute is only an expression of what was the law without the statute. Undoubtedly the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges. *Dow v. Beidelman*, 125 U. S. 680; 8 Sup. Ct. Rep. 1028. But in the absence of statutory regulation upon the subject the courts must decide what is reasonable. *Dow v. Beidelman*, *supra*; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468. This being so, we are unable to see how the statute here deprives the appellant of its property without due process of law. If the legislature has failed to fix a reasonable rate, then the courts must decide for the railroad companies, when controversies arise, what is a reasonable rate. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

But we held in *Chicago, etc., R. Co. v. People*, 77 Ill. 443, that the 1st section of this statute should be construed in connection with the 8th, and that the latter section, by providing for the making, by the railroad and warehouse commissioners, of a schedule of reasonable maximum

rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: "When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed. * * * It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates is not the exact form of statutory offense, and the taking of such higher rates might not subject to the penalties of the statute, upon the making of the proof that they were fair and reasonable. Still, as we view it, to constitute the offense really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates." This construction of the two sections, as related to each other, is not forbidden by the character of the act as a penal statute. Although penal laws are to be construed strictly, yet "the object in construing penal as well as other statutes is to ascertain the legislative intent." *U. S. v. Hartwell*, 6 Wall. 395. The statutory counts of the declaration in the case at bar contain an averment that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates. It thus avoids the defect for which the declaration in *Chicago, etc., R. Co. v. People*, supra, was condemned. Upon this branch of the case counsel for appellant rely upon the case of *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. Rep. 689, decided by the Circuit Court of the United States, sitting in Tennessee; but a comparison of the statute of Tennessee which was under consideration in that case with the Illinois statute under which the present suit is brought will show that they differ from each other in many respects. In *Stone v. Trust Co.*, 116 U. S. 307; 6 Sup. Ct. Rep. 334, 388, 1191, the Supreme Court of the United States passed upon the validity of a statute of Mississippi passed in 1884, and entitled "An act to provide for the regulation of freight and passenger rates in this [that] state, and to create a commission to supervise the same and for other purposes," which is similar, in many of the essential features, to the Illinois act of 1873. It was objected to the Mississippi act that it was void for want of sufficient certainty, and the case of *Louisville & N. R. Co. v. Railroad Commission*,

supra, was referred to in support of the objection. But Chief Justice WAITE, in delivering the opinion of the court in the Stone case, says of the Mississippi statute: "It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. * * * We find nothing in it to show that the statute, as it now stands, is altogether void and inoperative." See, also, *Stone v. Railroad Co.*, 62 Miss. 607. We are not convinced that it is our duty to hold said act of 1873 void for uncertainty in defining the offense for the commission of which it imposes the penalties therein mentioned.

2. It is claimed that the provision contained in said section 8, which authorizes the commissioners to fix for each of the railroads in the state a schedule of reasonable maximum rates is unconstitutional, as being an attempted delegation of legislative power. The constitutional provisions on this subject are as follows: "And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." Const. art. 11, § 12 (1 Starr & C. Ann. St. 163). "The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Const. art. 11, § 15 (1 Starr & C. Ann. St. 164). The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies; and the charges for services or other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of congress to regulate foreign and interstate commerce. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, Id. 145; *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468. This doctrine is not here controverted. It is admitted that if, in the act of 1873,

the legislature had prescribed in definite and specific figures reasonable maximum rates of charges, the law would have been valid. By an act approved April 15, 1871, the legislature of Illinois classified the railroads in the state into four classes, and provided that those in the first class should be limited to two and one-half cents per mile, those in the second class to three cents per mile, those in the third to four cents per mile, and those in the fourth class to five and one-half cents per mile, as compensation for the transportation of any person with a certain amount of ordinary baggage. Laws Ill. 1871, 640. We held this law to be valid. *Ruggles v. People*, 91 Ill. 256. The Supreme Court of the United States affirmed the decision. *Ruggles v. Illinois*, 108 U. S. 526; 2 Sup. Ct. Rep. 832. The objection made to the act of 1873 is that it is not such an act as was the act of 1871, which was repealed on March 31, 1874 (2 Starr & C. Ann. St. 2368). The act of 1873 is said to be invalid because, instead of establishing reasonable maximum rates of charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held, in a number of cases, that statutes which create boards of commissioners, and authorize them to make schedules of rates for railroad companies, are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative, rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end; and that, as the reasonableness of rates changes with circumstances, and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the legislature from the use of the agencies necessary to perform the duty imposed upon it by the Constitution; in short, that the legislature may authorize others to do things which it might properly, but not conveniently or advantageously, do itself. *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281; 37 N. W. Rep. 782; *Railroad Co. v. Smith*, 70 Ga. 694; *Tilley v. Railroad Co.*, 5 Fed. Rep. 641; *Railway Co. v. Dey*, 35 Fed. Rep. 866; *State v. Fremont, etc., R. Co.*, 22 Neb. 313; 35 N. W. Rep. 118; *Id.*, 23 Neb. 117; 36 N. W. Rep. 305; *People v.*

Harper, 91 Ill. 357; 8 Am. & Eng. Ency. of Law, 911. In *State v. Chicago, M. & St. P. Ry. Co.*, supra, the 8th section of the Minnesota statute, which was there held to be constitutional, provided that the railroad and warehouse commissioners should have the power, in case the tariffs of rates, fares, charges or classification filed and published by the railroad companies should be unreasonable, to change them, and make them reasonable, and compel the carriers to adopt them as thus changed, and, upon refusal, to enforce compliance by mandamus; and said section also declared that it should be unlawful for any common carrier to charge a higher or lower rate than that fixed and published by the commission.. In that case the Supreme Court of Minnesota interpreted the 8th section to mean that the rates recommended and published by the commission in the manner required by the act, were not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what were lawful or equal and reasonable rates, and that, in proceedings to compel compliance, no issue could be made, or inquiry had, as to the equality and reasonableness of the rates in fact. It was there conceded by counsel that the legislature could declare the schedule of rates fixed by the commission to be *prima facie* evidence of what was equal and reasonable, but the court held that the legislature had the power to create a commission whose judgment or determination as to what was reasonable should be final and conclusive. The Minnesota case was taken to the Supreme Court of the United States, and the judgment therein rendered was reversed upon the ground that the Minnesota statute, as construed by the Supreme Court of that state, conflicted with the constitutional provision forbidding the states to deprive persons of their property without due process of law. *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418; 10 Sup. Ct. Rep. 462, 702. In the latter case, Mr. Justice BLATCHFORD, in delivering the opinion of the court, said of the statute: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finalty, the action of a railroad commission, which, in view of the powers conceded to it by the state

court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." From this decision Justices BRADLEY, GRAY and LAMAR dissented, and held, in their dissenting opinion, that there was no good reason why the legislature might not delegate the duty of regulating and fixing the charges, so as to make them equal and reasonable, to such a board of commissioners as was provided for in the Minnesota statute. Subsequently, in the case of *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468, the case of *Chicago, etc., Ry. Co. v. Minnesota*, supra, was reviewed and explained. The doctrine of *Munn v. Illinois*, supra, and of the other cases known as the "Granger cases," in 94 U. S. 155-181, was adhered to; and it was held that the Minnesota law had been declared invalid because it had been construed by the Supreme Court of that state "as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates." We understand the doctrine of *Chicago, etc., Ry. Co. v. Minnesota*, supra, and of *Budd v. New York*, supra, to be as follows: The legislature has the power to directly fix the rates of charges. It has the right to declare what is reasonable. When it does so, its declaration is conclusive as to the reasonableness of the rates, and a charge beyond the maximum fixed by it might be regarded as unreasonable. But, where the legislature creates a commission to regulate the rates of charges, such commission has power to make a schedule of rates which shall be final and conclusive evidence, but the determination of the commissioners should be received in the courts as prima facie evidence that such determination was right and proper. So, also, the Iowa statute, which was held to be unconstitutional as a delegation of legislative power in *Railway Co. v. Day*, supra, provided that the schedule made by the commissioners should be prima facie evidence of the reasonableness of the rates therein charged, in all suits brought against the railroad corporations.

Under the constitutional provisions above quoted, the legislature of this state has the right, and it is its prerogative, if it chooses to exercise it, to pass a law establishing or fixing reason-

able maximum rates of charges. When it passed the act of 1873, it did not choose to exercise the power thus conferred upon it. That act does not establish reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners the power to establish such rates. When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But "when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts, to inquire judicially whether the charges are reasonable." *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 462; 10 Sup. Ct. Rep. 704. The decision in *Chicago, etc., Ry. Co. v. Minnesota*, *supra*, does not base the invalidity of the Minnesota statute upon the ground that the provision making the schedule of the commissioners final and conclusive as to the reasonableness of the rates was a delegation of legislative power to the commission. Nor do we deem it necessary to decide whether such a provision would amount to a delegation of legislative power or not. But, if it be conceded that making the schedule of the commission final and conclusive as to the rates is a delegation of legislative power, it is sufficient to say, in the present case, that the act of 1873 does not give to the schedule any such final and conclusive effect. We are, therefore, of the opinion that the act is not unconstitutional for the second reason urged upon our attention by counsel.

3. It is urged that the provision of the statute making the schedule of the commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be

sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. 2 Rice Ev. 806, 807; Com. v. Williams, 6 Gray, 1; State v. Hurley, 54 Maine, 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. Railway Co. v. Campbell, 86 Ill. 443; Railroad Co. v. Funk, 85 Ill. 460; Railroad Co. v. Larmon, 67 Ill. 68; Railroad Co. v. Rogers, 62 Ill. 346; Railroad Co. v. Clampit, 63 Ill. 95; Railroad Co. v. Quaintance, 58 Ill. 389. Acts making tax deeds prima facie evidence of the regularity of the proceedings antecedent to the deed have been held to be valid. 2 Rice Ev. 607; Hand v. Ballou, 12 N. Y. 541; Delaplaine v. Cook, 7 Wis. 54; Allen v. Armstrong, 16 Iowa, 508; Wright v. Dunham, 13 Mich. 414; Gage v. Garraher, 125 Ill. 451; 17 N. E. Rep. 777. See, also, Williams v. Insurance Co., 68 Ill. 387. Cases referred to by counsel, which involve the validity of acts providing for references to auditors or referees, and making the findings of facts by them in their reports prima facie evidence of the facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The Supreme Court of Iowa has decided that a provision as to the reasonableness of the charges is unconstitutional, because judicial inquiry is thereby cut off. We do not, however, understand the federal cases to hold that an act of a state legislature may not be valid, if, while omitting to itself fix the maximum rates, it creates a commission with authority to make schedules which shall be prima facie evidence of the reasonableness of the rates. Where the schedule is only made prima facie evidence, the court, in a suit against the carrier, can inquire and determine what is a reasonable rate; and the defect which was found to exist in the Minnesota law is thus obviated. Such is the character of the Illinois act of 1873, which provides, in section 8, that the schedule made, published and cer-

tified by the commissioners shall, in all suits brought against the railroad corporations, involving their freight and passenger charges, etc., be "deemed and taken, in all courts of this state, as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges," etc. One of the criticisms made upon the construction given by the Supreme Court of Minnesota to the statute in that state is expressed in *Chicago, etc., Ry. Co. v. Minnesota*, supra, in the following words: "The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely prima facie equal and reasonable." The Mississippi statute, which was held to be a valid law in *Stone v. Trust Co.*, supra, contained a provision that the making the schedule of the commission prima facie evidence of the reasonableness of the rates of charges, as contained in a statute of that state similar to the said act of 1873, was not obnoxious to the objections here urged against it, saying: "The provision of the statute that the rates fixed by the commissioners shall be regarded as prima facie reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceedings under the laws of the state. The law presumes the acts of officers of the state to be rightfully done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff." *Railway Co. v. Dey*, 82 Iowa, 312; 48 N. W. Rep. 98. See, also, *Chicago & A. R. Co. v. People*, 67 Ill. 11.

4. It is contended that the statute has been held to be unconstitutional as to interstate shipments, and that, therefore, it is void as a whole. This contention is based upon the decisions of this court in *People v. Wabash, St. L. & P. Ry. Co.*, 104 Ill. 476, and *Wabash, St. L. & P. Ry. Co. v. People*, 105 Ill. 236, and of the Supreme Court of the United States in *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4. In the Illinois cases the action was to recover for unjust discrimination in carrying the same class of freight from Peoria to New York city for a less sum of money than similar freight was carried from Gilman to New York city, Peoria being a greater distance from New York

than Gilman, and being eighty-six miles further west in Illinois, upon the defendant company's road, from a station near the eastern boundary of Illinois than Gilman. The judgments in the Illinois cases were reversed by the United States Supreme Court in the *Wabash, etc., Ry. Co. case*, *supra*, because of the interpretation placed by this court upon those sections of the act of 1873 which relate to unjust discrimination, and not because the United States Supreme Court considered the act of 1873 invalid, as amounting to an attempted regulation of commerce. The latter court, in the *Wabash, etc., Ry. Co. case*, *supra*, said: "It might admit of question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state." The question whether the Illinois statute was or was not so designed by its framers was not as carefully considered in the above cases as it would have been, had it not been for the construction therein placed upon the previous decisions of the Federal Supreme Court. The latter decisions were then understood as holding that a state law prohibiting unjust discrimination in the rates of charges for the transportation of property between points wholly within the state, whether it was a part of a continuous carriage to a point out of the state or not, was not invalid, in the absence of congressional action upon the subject, and when construed as the act of 1873 was construed in the Illinois cases. With such understanding of the federal rulings, this court held that, while the provisions of the act of 1873 relating to unjust discrimination were inoperative upon that part of the contract of shipment which had reference to the transportation outside of the state, they were binding and effectual as to so much of the transportation as was within the limits of the state. In the opinion of the majority of the court (Chief Justice WARRE and Justices BRADLEY and GRAY dissenting) in *Wabash, etc., Ry. Co. v. Illinois*, *supra*, Mr. Justice MILLER said: "It cannot be denied that the general language of the court in these cases, upon the power of congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it." In the same opinion the same learned justice, in speaking for the majority, while stating that they were bound by the

construction given by this court to the Illinois statute, and that this court had so construed the statute as to make it apply to commerce among the states, also said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." Looking, however, at the provisions of the act of 1873 which have reference to unjust discrimination, in the light of the construction given to them in the Illinois cases above referred to, the Federal Supreme Court held those decisions invalid, as applied to unjust discrimination in the rates of charges for the transportation of property within the state, when such transportation was part of a continuous carriage from a point within to a point without the state, upon the ground that such construction made the provisions conflict with the constitutional grant to congress of power to regulate interstate commerce. This court might be inclined to consider the question whether the construction announced in said cases and accepted by the United States Supreme Court, may not have been incorrect, and unauthorized by the language of the act, if the present suit had arisen under those sections of the act which have reference to unjust discrimination. But the case at bar arises under the provisions which prohibit the charge of more than fair and reasonable rates. This action is brought for damages growing out of alleged charges of unreasonable rates for the transportation of property between points lying wholly within the state, and not being part of a continuous transportation to any point outside of the state. It is within the power of the legislature to so amend the act as clearly to limit the provisions concerning unjust discrimination to commerce carried on within the state.

Counsel claim that the provisions relating to interstate commerce are so intimately connected with those relating to commerce carried on wholly within the limits of the state as not to be separable, the one from the other, and that, as the act has been declared invalid when applied to interstate commerce, it must also be invalid as applied to state commerce. Upon this point, reference is made to cases holding that words of limitation cannot be introduced into a penal statute, so as to make it specific,

when, as expressed, it is general only. *U. S. v. Reese*, 92 U. S. 214; *Trade Mark cases*, 100 U. S. 82; *Baldwin v. Franks*, 120 U. S. 678; 7 Sup. Ct. Rep. 656, 763. If the doctrine of these cases is applicable to the case at bar, it is only applicable to the sections of the act of 1873 relating to unjust discrimination; and the effect of its application would be to hold those sections void, as affecting transportation within the state, because they had been held void as affecting interstate transportation, but the effect would not be to invalidate the act, so far as it relates to charges of fair and reasonable rates alone. Where a part of a statute is unconstitutional, the remainder will not be declared unconstitutional also, if the two are distinct and separable, so that the latter may stand, though the former becomes of no effect. The constitutional and unconstitutional provisions may sometimes be contained in the same section, but do not necessarily fall together, unless they "are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

* * * If a statute attempts to accomplish two or more objects, and is void as to one, it may still be, in every respect, complete and valid as to the other. * * * A legislative act may be entirely valid as to some classes of cases, and clearly void as to others." *Cooley Const. Lim.* (6th ed.) 211, 213; *Dupee v. Swigert*, 127 Ill. 494; 21 N. E. Rep. 622. An examination of the act of 1873, in the light of these principles of construction will show that parts of the act relate to the prevention of unjust discrimination between persons and places in the rates of charges for transportation, while other parts relate to the prevention of charges that exceed fair and reasonable rates. Sections 2 and 3 of the act relate more particularly to unjust discrimination, and their aim is "against favoritism — against charging one shipper more than another for the like service under like conditions." *Railroad Co. v. Ervin*, 118 Ill. 250; 8 N. E. Rep. 862; *Illinois Cent. R. Co. v. People*, 121 Ill. 304; 12 N. E. Rep. 670. Section 1, in connection with sections 7 and 8, concerns the question, whether the rate charged a passenger or shipper is reasonable or not, irrespective of the charge

that may be made against another passenger or shipper or at another point. It is easy to see that there is a difference between extortion and discrimination. Hence, we think that the provisions of the act upon the two subjects can be separated and disconnected from each other so that those portions relating to reasonable charges may stand, even if those portions relating to unjust discrimination fall. Whether the latter do or must fall or not we do not decide. It is to be noted, however, that in *Railroad Co. v. Ervin*, *supra*, and *Illinois Cent. R. Co. v. People*, *supra*, this court treated the whole of the act of 1873 as valid, as applied to commerce wholly within the state. The *Wabash, St. L. & P. Ry. Co.* cases, 104 Ill. 476; 105 Ill. 236, arose under the sections relating to unjust discrimination; and it was those sections which were therein construed as being "broad enough to include unjust discrimination in the rates of charges for the transportation of property from a point within to a point without the state." The provisions of the act relating to fair and reasonable rates were not construed as being broad enough to prohibit charges of more than reasonable rates for transportation outside of the state, or within it, as part of a carriage beyond the state. Therefore, the question whether these provisions were intended to apply only to transportation between points lying wholly within the state, and disconnected from a continuous carriage to a point outside of the state, is not a question which is settled in the decisions of the *Wabash, St. L. & P. Ry. Co.* cases. After a careful study of the terms of the act, we are of the opinion that the 1st section, read in connection with the title, and sections 7, 8 and 11, applies only to charges of reasonable rates for such transportation within the state as is not a part of a continuous transportation without the state, and, therefore, does not infringe upon the power of congress to regulate interstate commerce. The title of the act is "An act to prevent extortion * * * in the rates charged for the transportation of passengers and freights on railroads in this state," and not on railroads outside of this state. The railroad corporations forbidden by section 1 to charge more than reasonable rates are thus therein described: "Any railroad corporation organized or doing business in this state under any act of incorporation, or general law of this state, now in force, or which may hereafter be enacted, or any railroad corporation

organized, or which may hereafter be organized under the laws of any other state, and doing business in this state." Section 11 provides that the term "railroad corporation," contained in the act, shall be taken to mean all corporations, etc., now or hereafter owning or operating "any railroad, in whole or in part, in this state," and to apply to all persons, whether incorporated or not, "that shall do business as common carriers upon any of the lines of railway in this state," etc. Section 1 forbids the charging of more than reasonable rates for the transportation of passengers or freight or cars "upon any railroad within the state." Section 8 directs the railroad and warehouse commissioners to make "for each of the railroad corporations doing business in this state" a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars "on each of said railroads." It is quite manifest that the schedule thus required to be made is of more importance in determining what are reasonable rates of charges than in determining whether there has been unjust discrimination. In section 3 the discriminating rates, charges, etc., therein referred to, are made prima facie evidence of unjust discrimination, without mention of the schedule. If the greater distance (from Peoria to New York) and the shorter distance (from Gilman to New York) are given, and the fact is ascertained that the charge for transportation over such greater distance is less than the charge therefor over such shorter distance, a discrimination is at once established, whether the whole of the distances be regarded, or the proportional parts thereof in this state. Given the facts of the distances, whether without or within the state, and of the actual charges, and the question of discrimination is determined, though reference to the schedule may be made as to the injustice of the discrimination to the individual. But it could not have been the intention of the legislature that this schedule should be prima facie evidence of what were reasonable maximum rates of charges for transportation outside of the state, or for such transportation within it as might be a part of a continuous transportation from within to without. Other states would have their own laws and commissioners, and methods of ascertaining rates. The railroad and warehouse commissioners named in schedule 8 are Illinois officials, appointed by the governor, with jurisdiction limited to this state, and with-

out power or opportunity to gather the data for fixing reasonable rates of transportation outside of the state, or within the state, as connected with a continuous carriage to a point beyond its limits. The act establishing the board of railroad and warehouse commissioners provides that only railroads incorporated or doing business in this state shall make sworn statements of their affairs to said commissioners. 2 Starr & C. Ann. St. 1956-1958. Section 7 of the act of 1873 requires the commissioners to ascertain whether the provisions of the act have been violated by "any railroad corporation in this state," and for that purpose "to visit the various stations upon the line of each railroad." We construe these features of the act to indicate that, so far as the provisions relating to the charges of reasonable rates are concerned, it was not the intention of the legislature to make them apply to any other kind of transportation than that which should occur wholly within the boundaries of this state, or to any other kind of contracts than those for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states. Consequently, we hold the provisions relating to charges of reasonable rates to be valid.

5. The statute granting power to the railroad commissioners to make a schedule of reasonable maximum rates for appellant is alleged to be a violation of appellant's charter, so as to impair the obligation of its contract with the state, and, therefore, the act is said to be void as to appellant. This point is settled adversely to appellant by the cases of *Ruggles v. People*, 91 Ill. 256, and *Ruggles v. Illinois*, 108 U. S. 526; 2 Sup. Ct. Rep. 832. In the former case, one of the questions submitted by the stipulation was whether a law establishing a reasonable maximum rate of charges for the transportation of passengers on railroads in this state was such a constitutional law as appellant "was bound to obey, * * * notwithstanding the provisions of its charter;" and it was there held that the law was valid, and that the legislature has the power to fix a maximum rate of charges for corporations exercising a business public in its character, and that such regulation does not impair the obligation of the contract in their charters. In *Ruggles v. Illinois*, *supra*, the provisions of appellant's charter are fully set out. It is not denied that, by consolidation and statutory provisions, appellant acquired the powers and fran-

chises granted to the Central Military Tract Company by an act to incorporate the latter company passed on February 15, 1851, and by an act to amend said act passed on June 19, 1852. By section 3 of said act of 1851, said company was thereby "created and incorporated for the purpose of organizing under an act entitled 'An act to provide for a general system of railroad incorporations,' in force November 5, 1849," and was "entitled to have and exercise the powers and privileges, and be subject to the liabilities therein enumerated." The general law of 1849, in clause 10 of section 21 thereof, conferred upon railroad companies organized thereunder the right "to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided." It also provides, in section 32, that "the legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon such roads; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company from all sources from the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in." The 6th section of the act of 1852 is as follows: "The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interest of the company; provided, that the same be not repugnant to the Constitution and laws of the United States or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time, by their by-laws, determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the

width of track, and all other matters and things respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine." It is now claimed by the appellant that it still has the right, under its original charter of 1851, of fixing rates, subject only to a limit of three cents a mile on passengers, and that the state has no power to interfere, except to keep the annual profits down to fifteen per cent per annum on the paid-up capital, and that the act of 1873, giving the commissioners power to make a schedule of maximum reasonable rates for appellant, ignores these limitations upon the power of the state to regulate its charges. Although the act of 1852 is entitled "An act to amend the charter of 1851," it is a complete charter in itself. It contains provisions not found in the general law of 1849. The plea alleges that it was accepted by appellant, and it was evidently intended and accepted as a substitute for the charter of 1851. In *Ruggles v. Illinois*, supra, it was contended by appellant that the act of 1852 repealed sections 21 and 32 of the old charter, with the limitations therein contained as above set forth, and that under section 6 of the amending act of 1852, as above set forth, appellant could establish its own rates of fare and freight, free from legislative interference. In that case the Supreme Court of the United States declined to decide whether section 6 of the amending act repealed clause 10 of section 21 and section 32 of the original charter, or not. But they held that, under said section 6, no by-law could be established by the directors that did not conform to the laws of the state, whether such laws were in force when the amended charter was granted, or came into operation afterwards; that the power of the company for the regulation of its own affairs was, in express terms, subjected to the legislative control of the state; that the by-laws fixed the rates, and no by-law could be made that was at all repugnant to the laws of the state; that only such charges could be collected by appellant as were allowed by the laws of the state; that, in the absence of legislation, the power of the directors over the rates is subject only to the common-law limitation of reasonableness, but that the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property; that when a maximum is so established the rates fixed by

the directors must conform to its requirements — otherwise, the by-laws would be repugnant to the laws. Adopting the views thus expressed by the Federal Supreme Court, we are of the opinion that there is nothing in appellant's charter which relieves it from the obligation to submit to the provisions of the act of 1873 upon the subject of reasonable rates, and that the act does not impair the obligation of any contract alleged to be contained in appellant's charter.

6. It is claimed that the schedule of 1873, which was admitted in evidence, was not published as required by statute, and that for that reason it did not go into effect. The copy of the schedule of September 1, 1873, introduced by the plaintiff, was accompanied by the following certificate, which was attached to it: "Office of the Railroad and Warehouse Commission, Springfield, Illinois. State of Illinois, Sangamon County — ss.: We, the undersigned, railroad and warehouse commissioners in and for the state of Illinois, do hereby certify that the foregoing is a true copy of 'A Schedule of Reasonable Maximum Rates of Charges for the Transportation of Passengers and Freight and Cars,' together with a classification of freight, explanatory and forming a part of said schedule, revised and prepared by the railroad and warehouse commission for the Chicago, Burlington and Quincy Company; that said 'classification of freight' and schedule has been published as required by law in the Illinois State Journal, a weekly newspaper published in the city of Springfield, in said state, in the issues of said paper dated, respectively, September 3d, 10th, 17th and 24th, and October 1, A. D. 1873, as revised, and was in force from and after September 1, A. D. 1873, and remained in force until December 1, A. D. 1881. Witness our hands this 7th day of February, A. D. 1891. John R. Wheeler, Isaac N. Phillips, W. R. Crim, Railroad and Warehouse Commissioners. Attest: J. H. Paddock, Secretary." This certificate shows that publication of both the classification and the schedule was made, not only for three successive weeks, but for five successive weeks, and that, consequently, the provision in section 8 as to publication was fully complied with. The trial court was authorized to admit it, and, when admitted, it was "prima facie evidence of the schedules of said commissioners." At the

close of plaintiff's evidence the defendant introduced another certificate of the commissioners, dated December 1, 1891, and other evidence, for the purpose of showing that the classification of freights, which recited on its face that it formed a part of each schedule, was published on September third, tenth and seventeenth, and that the schedule for appellant, which refers to the classification as forming a part of it, was published on September seventeenth and October first. The classification was published three successive weeks, and the schedule was published three successive weeks; but the point is made that, as the schedule referred to the classification, the latter was a part of the former, and that when the schedule was published, on September seventeenth, twenty-fourth, and October first, the classification should have been published, as a part of it, and in the same issues of the newspaper with it. As the classification was for all the railroads, and a schedule was made for each, it is a question whether it was necessary to republish the classification with each schedule, it having already been published for the time required by law. The classification was on file in the office of the commissioners, and the schedules referred to it, and the roads could have access to it. The certificate, however, as above set forth, was merely prima facie evidence that the schedule introduced was that of the commissioners. Other evidence might be introduced to show that it was their schedule. This evidence was furnished by the defendant itself. Its own proof showed that the copy introduced was a copy of the schedule prepared and adopted for it by the commissioners. It is not contended that the defendant did not have notice of the schedule of September, 1873, irrespective of any publication of it.

7. But even if it be true that the schedule could not go into effect until it was published in the manner required by the law, and that the separate publication of the classification and the schedule was not in compliance with section 8, we still think that the certificate above set forth was sufficient. The case below was not tried until November 30, 1891. By act approved June 30, 1885, the legislature amended said section 8, and in the amended section provided as follows: "All such schedules heretofore or hereafter made shall be received and held in all such suits as prima facie the schedules of said commissioners without further

proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad and warehouse commissioners, that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named." 3 Starr & C. Ann. St. 1029. The certificate of February 7, 1891, conforms to the requirement of section 8, as thus amended. No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights, or rights subsequently acquired. Changes in them may be made applicable to existing causes of action. Cooley Const. Lim. (6th ed.) 451; Gage v. Caraher, 125 Ill. 447; 17 N. E. Rep. 777.

8. Appellee assigns as a cross error the overruling of his demurrer to the sixth plea of the defendant. This plea was to the last additional count of the amended declaration, and averred that the causes of action therein set out did not accrue to the plaintiff within five years next before the filing, or the obtaining of leave to file, said last additional count, or the substitute therefor. The question is whether the amendment, or the last count of the amended declaration, sets up a new cause of action. If it does, the demurrer to the plea was properly overruled. If it does not, the amendment takes effect from the commencement of the suit. When an amendment sets up no new matter or claim, but merely restates in a different form the cause of action set out in the original declaration, it relates to the commencement of the suit, and the Statute of Limitations is arrested, at that point; but, where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date. Baker v. Railway Co., 34 Mo. App. 98. In this case the two counts of the original declaration, and all the additional counts of the amended declaration, except the last, sought to recover the treble damages allowed by the statute for a violation of its provisions; and to these counts the two years' Statute of Limitations was properly pleaded, as, in this state, actions for a statutory penalty must be brought within two years next after the cause of action accrued. The last amended count,

filed more than seven years after the filing of the original declaration, sought to recover damages for the violation of defendant's common-law liability as a carrier for charging more than reasonable rates. To this count the five years' Statute of Limitations was applicable. It is conceded by appellee that he cannot recover treble damages for unreasonable charges, except for those paid by him during the two years prior to the beginning of the suit, and that the object of the amended count is to recover single damages for the three years immediately preceding the two years for which treble damages are claimed. We think that the amended count introduced a new cause of action. The original declaration declares specially on the statute for the recovery of a statutory penalty; alleges, as the ground of action, the charge of rates in excess of those fixed by the schedule of the commissioners; and concludes: "Whereby, and by force of the statute, * * * an action hath accrued * * * to demand and recover of the defendant three times the amount of said sum of money," etc., "with reasonable attorney's fee, in a sum to be fixed by the court." The amended count is based on an alleged common-law liability or on an implied contract to repay money obtained by wrongful overcharges. Before it was filed the cause of action set forth in it had been barred by the five years' Statute of Limitations. If a new suit had been begun for the same cause of action at the time of the amendment, it could not have been maintained, and there is no more reason why the cause of action should be enforced when embodied in an amended declaration than when forming the subject-matter of a new suit. Although an amendment may properly be allowed, it does not necessarily, when allowed, have the effect of relating back to the date of bringing the suit for the purpose of determining questions of limitation. An amendment which introduces a cause of action barred by limitation is ineffectual to avoid the statutory bar. *Gibbons v. The Fanny Barker*, 40 Mo. 253; *Baker v. Railway Co.*, *supra*; *Gorman v. Judge*, 27 Mich. 138; *Melvin v. Smith*, 12 N. H. 462; *Illinois & St. L. R. & Coal Co. v. People*, 19 Ill. App. 141. Where the original declaration sets up overcharges upon certain shipments, and the amended declaration sets up overcharges on other and different shipments, the causes of action are not the same. *Railroad Co. v. Cobb*, 64 Ill. 140; *Phelps v.*

Railroad Co., 94 Ill. 548; Rolling Mill Co. v. Monka, 107 Ill. 340. Here the original declaration seeks to recover penalties for overcharges on shipments made subsequent to November 2, 1880, while the last additional count of the amended declaration declares for damages on account of overcharges on shipments made prior to October 17, 1880. We are of the opinion that there was no error in overruling the demurrer to the sixth plea.

One or two other minor objections are urged, but, after a careful consideration of them, we are satisfied that they are not well taken. The judgment of the Circuit Court is affirmed. Affirmed.*

STATE REGULATION OF RAILROADS — RECENT DECISIONS.

1. State regulation of railroad companies chartered by congress.—A state may prescribe the rates for transportation within the state by a railroad corporation created by act of congress, in the absence of anything in the statute indicating an intent by congress to remove such corporation from state control. *Ames v. Union Pacific R. Co.*, 64 Fed. Rep. 165, following *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; 9 Am. R. R. & Corp. Rep. 674, note 2.

2. Validity of act prescribing maximum rates which exempts a certain class of roads from its operation.—An act of Nebraska passed in 1893 prescribed certain maximum rates for the transportation of freight by railroads within the state, but provided that all railroads, or parts thereof, built since January 1, 1889, or which may be built before December 31, 1899, should be exempt from the provisions of the act until the latter date. Held, not a denial to railroads of the equal protection of the law, on the ground of unjust discrimination, because all the roads in the state were not subject to its provisions. *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165. Other cases supporting the right of the legislature to classify railroads and to discriminate between the rates to be charged by each class are the following: *Wellman v. Chicago & Grand Trunk R. Co.*, 3 Am. R. R. & Corp. Rep. 703; *Railroad Co. v. Iowa*, 94 U. S. 155; *Dow v. Beidelman*, 125 U. S. 680.

3. Is the reasonableness of rates established directly by the legislature open to judicial investigation?—In the principal case the Supreme Court of Illinois, under date of April 2, 1894, gives its understanding of the doctrine laid down by the Supreme Court of the United States, as follows: "The legislature has the power to directly fix the rates of charges. It has the right to declare what is reasonable. When it does so its declaration is conclusive as to the reasonableness of the rates, and a charge beyond the maximum fixed by it might be regarded as unreasonable." The same view is taken by the Supreme Court of Michigan in *Wellman v. Chicago & Grand Trunk R. Co.*, 3 Am. R. R. & Corp. Rep. 703, 725. So, also, the Court of Appeals of Kentucky, *Covington, etc., Turnpike Road Co. v. Sandford*, 20 S. W. Rep. 1031; 7 Am. R. R. & Corp. Rep. 651, note 1. The Supreme Court of the

* Reported in 149 Ill. 361; 37 N. E. Rep. 247.

United States has not directly passed upon this question. The question was involved in *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 839; 5 Am. R. R. & Corp. Rep. 638, but was not decided. But the logic of all the recent decisions is to the effect that rates, whether established directly by the legislature or by a commission, are subject to judicial investigation as to their reasonableness. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 413; 2 Am. R. R. & Corp. Rep. 564, and note p. 501; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 862; 9 Am. R. R. & Corp. Rep. 641, 659-661. In the latter case, in speaking of the authority of courts in this matter, it is said: "But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of the rights of property, and, if found to be so, to restrain its operation." 9 Am. R. R. & Corp. Rep. 659.

The fact that rates established directly by the legislature does not preclude judicial investigation of their reasonableness, is assumed as a matter of course, by BREWER, J., in *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165, where he disposes of the matter thus: "The fact that the rates are absolutely prescribed by direct act of the legislature, instead of being created by a commission appointed by the state, is immaterial." P. 173.

4. **The tests of reasonableness.**—In the recent case of *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165, 177, BREWER, J., says: "What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property — injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which they would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property — the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds — is not to be ignored, even though such sum is far in excess of the

present value. It was said in the case of *Reagan v. Trust Co.*, 154 U. S. 412; 14 Sup. Ct. Rep. 1059: "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others." It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads." See, also, *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 412; 9 Am. R. R. & Corp. Rep. 641.

5. **When rates will be deemed unreasonable.**—Where the rates established for any particular traffic are such as to preclude net earnings with respect to such traffic, they are unreasonably low. *Ames v. Union Pacific R. Co.*, 64 Fed. Rep. 165. The legislature of Nebraska established a maximum of rates for local freights upon railroads within the state, which amounted to a reduction of twenty-nine and one-half per cent, and which would not yield any net returns upon such business. The rates were held to be unreasonable. *Ibid.* The roads involved in this case were interstate roads, and did an interstate business, as well as local business, in other states. The local Nebraska business affected by the rates in question constituted only a small fraction of their total business. It was held, however, that even though, with the reduction in the Nebraska business, the roads would earn a fair compensation to stockholders, that fact would not make the rates in question reasonable, since congress and the other states, by a like reduction of rates, might destroy the earning capacity of the roads.

See further on the subject of when rates are reasonable, *Reagan v. Farmers' Loan & T. Co.*, 9 Am. R. R. & Corp. Rep. 641; *Commonwealth v. Covington, etc., Bridge Co.*, 7 Am. R. R. & Corp. Rep. 638.

6. **Testing the reasonableness of rates by comparison with rates in other states.**—It was also held in *Ames v. Union Pacific R. Co.*, 64 Fed. Rep. 165, that the fact that the rates in question were no lower, or not as low as local rates in other states, did not establish the reasonableness of the rates, since there was a difference in circumstances and conditions that rendered the service more expensive in Nebraska. Upon this point BREWER, J., says: "The question is asked, are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively, they are. That is, the roads may not discriminate against the people of any one state. But not necessarily absolutely as cheap, for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are

230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance."

See, also, *Hopper v. Chicago, M. & St. P. R. Co.*, (Iowa) 60 N. W. Rep. 487.

7. A special remedy provided by act held not to preclude equity jurisdiction of federal courts.—The Circuit Court of the United States has jurisdiction of actions by nonresident stockholders of railroad companies doing business in Nebraska, against such companies and the board of transportation of such state and its officers to enjoin defendants from putting in force, as to such companies, a state statute fixing the maximum rates for transportation of freight within the state, where the rates are unreasonable, and where the only remedy provided by the act is that, by petition, a railroad company may obtain from the Supreme Court of such state an opinion that the rates are unreasonable, and an order directing such board, in its discretion, to permit the company to raise its rates. *Ames v. Union Pacific R. Co.*, 64 Fed. Rep. 165.

DOONER V. DELAWARE & H. CANAL CO.

(Supreme Court of Pennsylvania, October 1, 1894.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. DUTY AS TO FURNISHING APPLIANCES. It is the duty of a railroad company to exercise reasonable care in furnishing its servants with safe machinery and implements for the transaction of its business; but it is not bound to furnish the best and safest appliances, nor the latest improvements.

2. It is the duty of a railroad company to its brakeman to take ordinary care that the ends of freight cars be furnished with such handles, ladders or safeguards as are in common ordinary use on railroads.

3. The Constitution of Pennsylvania (Art. 17, § 1), directing railroads to receive and transport cars, without delay or discrimination, of a connecting road, does not oblige it to move such cars when not provided with the appliances which ordinary care requires for the safety of the crew, and, therefore, does not relieve them from liability to their employees in negligently doing so.

4. CONTRIBUTORY NEGLIGENCE. FLYING SWITCH. It is not contributory negligence for a brakeman to make a flying switch, where it is required by the nature of his employment.

5. FAILURE TO OBSERVE DEFECTS IN CAR. Where a brakeman had not previously been on a car which he was to side-track by a flying switch, and claimed that he did not know that it was unprovided with handles to grasp after uncoupling it, his duty having compelled him to act at once, without opportunity for inspection, the question of his contributory negligence is for the jury.

6. OPINION EVIDENCE. It is error to admit the opinion of an expert as to whether it was a defect in a freight car that there was nothing on the end of it for a brakeman, after uncoupling for a flying switch, to lay hold of.

7. While a railroad may prove not only written but oral instructions given to its assistant inspectors, its inspector cannot give his opinion as to what the duties of the assistants were under the instructions given by him to them.

8. INSTRUCTIONS. An instruction that "no sane man would lose a leg for any compensation, but you are not to be guided by such a consideration as that in arriving at the amount of damages," is objectionable, as drawing away the mind from the legal measure of damages.

9. An instruction is improperly given where there is no evidence on which to base it.

ACTION by John F. Dooner against the Delaware and Hudson Canal Company for injuries received as brakeman in defendant's employ. Judgment for plaintiff. Defendant appeals.

Andrew H. McClintock and George R. Bedford, for appellant. *L. H. Bennett and John McGahren*, for appellee.

DEAN, J. The plaintiff, John F. Dooner, was a railroad brakeman. This had been his occupation for about five years, and for the last year prior to 31st of October, 1889, he was in the service of the defendant company. On that day, while in the performance of his duty as brakeman, he was run over by a freight car which defendant was transporting, and lost his leg. The accident came about in this way: The railroad of defendant begins at Wilkes Barre, where it connects with a number of railroads entering and passing through the city. It is the duty of defendant to accept and transport the cars of other roads over its lines on their way to destination. A regular freight train is made up on defendant's road, to run north from Wilkes Barre, about two o'clock in the afternoon of each day. On the day in question this train numbered twenty-two cars, in charge of a crew made up of a conductor, engineer, fireman and four brakemen. The brakemen were placed on the train: First, Ross; second, Dooner, this plaintiff; third, May; and fourth, Ahes. Among the cars making up the train was one — No. 1,093 — laden with apples received from the Pennsylvania railroad. This car was coupled to the engine, and the next car to it was one of merchandise, both to be cut off and side-tracked at Scranton. The train, thus made up and manned, left Wilkes Barre and reached Scranton on defendant's road, where it runs by a stone-arched subway under the Lackawanna railroad. The car of merchandise was to be left at a sid-

ing south of this subway, and the car of apples on a siding north of it. Dooner attended to the switching. The merchandise car was first placed upon its proper siding. Then the apple car was run to another siding by what is called a "flying switch," that is, uncoupling the car from the engine while moving, and applying the brake to the car, the engine then making such distance between it and the car, by its increased speed, as to allow of connecting the side track with the main track at the switch after it has cleared the connection. Dooner standing on the beam, four to five inches wide, uncoupled the apple car from the locomotive; then, from the right side, signaled the engineer to go ahead; then turned to apply the brake on the left side, fell from the beam to the track, and had his leg crushed. The plaintiff alleged his injury was caused by defendant's negligence in not furnishing this apple car with the ordinary appliances of safety, such as ladders or grabs; in consequence, in performance of his work with ordinary care, he was seriously crippled. He alleges that after drawing the coupling pin, and while standing on the narrow beam of the car, he turned to seize hold of a handle, grab-iron or rod, which ought to have been there, but, there being none, he fell to the track. The defendant contended that plaintiff was guilty of contributory negligence in side-tracking the train by the "flying switch," instead of by pole or rope; (2) in not discovering the absence of grab-iron, handles or rods before he attempted a dangerous method of side-tracking the car; (3) in not remaining on the center of the beam, and from there signaling to the engineer, instead of going to the side of the car for that purpose. The court submitted the evidence of negligence of defendant and contributory negligence of plaintiff to the jury. There was a verdict and judgment for plaintiff, from which defendant appeals.

The appellant prefers twenty-two assignments of error, which might have been materially reduced in number without in any noticeable degree weakening the force of the argument.

The first to eighth, inclusive, and tenth, eleventh, twentieth and twenty-first aver errors in admission of and rejection of evidence and statements of the law on the question of defendant's negligence. The ninth and fourteenth to nineteenth, inclusive, allege error in the rulings of the court as to contributory negli-

gence on part of plaintiff. The twelfth and thirteenth allege error in the instruction as to measure of damages. The twenty-second complains of a denial of peremptory instruction to find for defendant.

As touching the negligence of defendant, a photograph of the end of a car was exhibited in evidence by plaintiff, as representing the end of this apple car, except that the apple car had no grab-iron like that in the photograph. The plaintiff and one other witness testified to this. If this were the fact — and that was for the jury — then this car had on the end near the side of it a brake wheel and chain; in the center, two small iron steps, for getting up to the roof — the first about three feet from the beam or platform, the second about the same distance above the first. The rule as to the duty of the employer, in view of this testimony, was correctly given to the jury by the court below. They were told that it was the duty of defendant to exercise reasonable care in furnishing its servants with safe machinery and implements for the transaction of its business; but that the law required nothing more; that it was not bound to furnish the best and safest appliances, the latest improvements, but was bound to take reasonable and ordinary care to furnish such car handles, ladders or safeguards as are in common, ordinary use upon railroads; and that it was not answerable to plaintiff for injury from a risk merely incident to his employment. This is, in substance, the law deducible from all the authorities.

Nor does the fact that the car in question was received from another road, to be transported by defendant's employees over its own road, relieve defendant from the duty of ordinary care in this particular. While every road must obey the mandate of section 1, article 17 of the Constitution, to "receive and transport * * * cars, loaded or empty, without delay or discrimination," of another connecting road, yet by no reasonable construction can that be held to mean cars of another road not in a condition for transportation, or not provided with the appliances which ordinary care requires for the reasonable safety of train crews in properly handling them. The obvious purpose of the section was to prohibit common carriers from discriminating in transportation between their own cars and those of other roads. All were to be moved over the lines of each other, with the same promptness and

impartiality. But the Constitution no more commands one road to move defective cars from other roads than to move its own cars when defective. So that, if there were any evidence of negligence here, there was no error in the instruction by which the evidence was submitted to the jury. The case of *Anderson v. Oliver*, 138 Penn. St. 156; 20 Atl. Rep. 981, cited by appellant, is not in point. In that case, it was not the duty of the employee to move the defective car, and his employer neither controlled nor managed the transportation on the railroad. In the case of *Kohn v. McNulta*, 147 U. S. 238; 13 Sup. Ct. Rep. 298, also cited, the alleged defective car of another road was of a design in daily use on the road where plaintiff was employed, and he had both seen and coupled cars like it. It was not out of repair, but merely of a design peculiar to the same class of cars on the connecting road, and it did not appear that it was lacking in any of the usual appliances of this class of cars. The measure of duty of the receiving road, as to cars turned over to it for transportation by connecting roads, is settled by many cases. "It is bound to make such inspection as the nature of the transportation requires, and if it pass and haul cars faulty in construction, or dangerously out of repair, it is answerable to its own employees who are thereby injured." The many cases, both in England and in this country, which sustain in substance this proposition, are cited in *Patt. Ry. Acc. Law*, 309. Here the printed rules of inspection, to govern the inspector in receiving foreign cars seem to assume the existence on the cars of the appliance which plaintiff alleges was absent. On page 10 it is made the duty of the inspector to see that "roof grab-irons, ladder handles, sill steps, ladder sides, and rounds, all sound and securely fastened to car body by either bolts or lay screws," exist. It was alleged that a freight car without handles or grab-irons was absolutely unknown, and without one or the other it was impossible for the brakeman to perform the duty exacted by his employment. The inspector is to see that the appliances are securely fastened, but no instruction is given to reject if they are not there at all. There was also evidence that the inspector was young and incompetent. We think it was a question for the jury to determine as to whether the company exercised the care required of it in this particular. In the case of *Railroad Co. v.*

Huber, 128 Penn. St. 63; 18 Atl. Rep. 334, the court says: "The testimony was very abundant that the company enforced a system of daily inspection of all cars at the place of this accident, and, if this had been thorough, the defect in this brake would have been discovered." Whether the system of inspection in this case was thorough depended on the instructions of the company and the competency of the inspector. It was a disputed fact for the consideration of the jury whether, by defendant's negligence, a defective car was taken upon its road, from another road, for transportation.

Then, as to the contributory negligence of plaintiff. There is no doubt that side-tracking a car by a "flying switch" is a highly dangerous operation, requiring quickness of perception and great alertness of movement on part of the brakeman. There is just as little doubt, however, that its performance as a duty by employees is required at times by the employer, especially in cases where the side-tracking must be quickly completed, so as not to encroach on the track when approaching passenger trains are due. There was ample evidence that this was the exigency here. Clearly, there was no negligence in plaintiff performing a highly dangerous duty, required by the nature of his employment, although, under ordinary circumstances, a much safer method for accomplishing the same purpose could have been adopted. Was he negligent in attempting the act while upon this car? That would depend altogether on the circumstances. The rule laid down by this court in *Coal Co. v. McEnery*, 91 Penn. St. 185, and distinctly and emphatically adhered to in *Railroad Co. v. Lyons*, 119 Penn. St. 324; 13 Atl. Rep. 205, and other cases, is that where the employee has knowledge of machinery being defective and dangerous, and uses it, he voluntarily accepts the risk, and cannot recover damages for an injury caused by such use. This was substantially the instruction given by the learned judge of the court below, and it fully met the facts as they were alleged by plaintiff. He claimed he had not observed this apple car before he attempted to side-track it, because it was one in immediate charge of the first brakeman from Wilkes Barre to Scranton; then, when the "flying switch" was to be made, there was no opportunity for previous observation, and his duty compelled him to at once use it; then, when he had drawn the coupling pin, signaled the engi-

neer, and turned to seize the grab-iron or ladder, he first discovered it had neither, and he fell to the track. The plaintiff, in the course of his employment, was bound to notice patent defects; and if this car had been in his charge and under his immediate observation from the time the train left Wilkes Barre, it may be that it would have been contributory negligence on his part to take his place on the beam to side-track it by a "flying switch." But these were not the facts, and the rule in *Railroad Co. v. Keenan*, 103 Penn. St. 124, applies — that under these circumstances the evidence on the question of contributory negligence is also for the jury. It was fairly submitted to them. All the assignments of error in the general charge and in answer to points touching the negligence of defendant and contributory negligence of plaintiff are overruled.

The first to fifth assignments are to the admission of evidence, under exceptions, of experts, to prove in effect that defendant was negligent; for opinions of witnesses that this apple car was defective and unsafe was substantially proving plaintiff's case by opinion. If this common freight car had been a complicated and intricate piece of machinery, the necessity of the case might have justified calling for the opinion of experts; but the freight car and its appliances were about as simple as the ordinary farm wagon. Plaintiff alleged it was defective because there was nothing to lay hold of when he had drawn the coupling pin. Clearly, the opinion of a witness as to whether this was or was not a defect was not the opinion of an expert, but of a man of ordinary intelligence and observation. The jury still have some duties to perform. Inferences drawn from the ordinary affairs of life ought not to be drawn for them and turned over under oath from the witness stand. In admitting these opinions the court committed the same error pointed out in *Graham v. Pennsylvania Co.*, 139 Penn. St. 149; 21 Atl. Rep. 151, where it is said: "As necessity is the ground of admissibility, the moment the necessity ceases the exception to the general rule that requires of a witness facts, and not opinions, ceases also. Hence, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." These assignments of error are

sustained. The opinions of the witnesses were as to a fact of which the jury could form an opinion as well as they.

The sixth, seventh and eighth assignments are to the refusal of the court to admit evidence of the oral instructions given by the chief inspector, McGinley, to his assistants. The defendant offered to prove by McGinley what oral instructions he gave to his assistants who inspected that day this apple car. There was no objection and the witness answered: "I gave those men instructions — that is, under me — for to give those cars taken from foreign roads thorough inspection, so as to be safe to go over the road, and safe to trainmen." Afterwards defendant proposed to prove what the duty of his assistants was, from oral instructions given by him, as to rejecting a car without grab-irons. The defendant had a right to prove precisely what the oral instructions, in addition to the printed rules, were. The opinion of the witness as to the duty of the assistants, under such oral instructions, is immaterial. The negligence or absence of negligence on part of defendant must be determined by the instructions, and what was done in pursuance of them. It cannot be determined by the opinion of the chief inspector. There was no error in rejecting the offer as made; nor was there any error in overruling the same offer of proof as to Edward Hartsell. The actual instructions, written and oral, were proven. These assignments of error are overruled.

As to the twelfth assignment, on the measure of damages, the language was not well chosen to express the thought of the learned judge. "No sane man would lose a leg for any compensation, but you are not to be guided by such a consideration as that in arriving at the amount of damages." The objection to such remarks is that their tendency is to unduly inflame damages. Analyze the probable effect. The corporation has been negligent. Thereby plaintiff lost his limb. No possible amount of money would compensate him for this loss. It is beyond power of recompense. The first suggestion to the mind of the juror is that this purely speculative estimate should be reached as nearly as possible. His mind is drawn away from the measure fixed by law — the loss of earning power — and directed to a wholly fanciful basis for estimate. Here was a man thirty years of age, with the earning power of a brakeman. The verdict is over \$8,000,

yielding, at five per cent, annual net earnings of \$400, with the principal intact at death. The amputation was between the knee and ankle, not resulting in total disability, for he testifies he is now engaged in a business which yields him an income. No sentiment should enter into such a computation, because the law has fixed the measure, and the court and jury, under their oaths, must adhere to the law. As this case must go back for another trial, without a formal ruling on this assignment, we are called upon to repeat, in substance, our views as set forth in *Baker v. Pennsylvania Co.*, 142 Penn. St. 503; 21 Atl. Rep. 979; and *Kehler v. Schwenk*, 144 Penn. St. 348; 22 Atl. Rep. 910.

The thirteenth assignment of error must be sustained. The court says, "You would probably be warranted in acting upon the rule that a man in good health would live to the ordinary age of sixty-five or seventy years." There was no evidence here as to the probable longevity of plaintiff. The average expectation of life of 1,000 men in good health at thirty years of age falls short of thirty-five to forty years more. Without referring to carefully compiled life tables, any man sixty-five years of age, from his own observation, will hesitate to say that at thirty the probability of survivorship is thirty-five or forty years longer. In looking back thirty-five years, to his acquaintances of that period, whose age then was about the same as his own, he will realize that he has survived the large majority of them, and that no such probability is to be deduced from his own observation. It may be there is such probability as to this plaintiff's life, but, if so, we have failed to discover any evidence in this record tending to establish it. Without evidence of such a probability, the adoption of it as suggested to the jury by the court was an error. This and the thirteenth assignments of error are sustained. The twenty-second is overruled, for, as we have already seen, the case is for the jury. The judgment is reversed, and a venire facias de novo awarded.*

Railroad companies—duty and liability with respect to foreign cars received for transportation.—See, generally, on this subject *Moon v. Northern Pac. R. Co.*, 4 Am. R. R. & Corp. Rep. 823, and note; 4 Am. R. R. & Corp. Rep. 411, note 5; *Thomas v. Missouri Pac. R. Co.*, 6 Am. R. R. & Corp. Rep. 197.

* Reported in 30 Atl. Rep. 269.

Where a railroad company receives a foreign car, and places it on one of its trains, and a brakeman is injured while mounting the car by the pulling out of a bolt which held a round of the ladder in place, the company is liable if, by the use of ordinary care, it could have discovered the defect, and negligence may be inferred from the nature of the defect. *Mateer v. Missouri Pac. R. Co.*, 105 Mo. 320; 15 S. W. Rep. 970. For a railroad to receive from a connecting line, and transport, cars with double buffers or deadwoods, in good condition, is not negligence making it liable to a brakeman for injury received in coupling, they being in use on other well-managed roads. *Northern Pac. R. Co. v. Blake*, (C. C. A.) 63 Fed. Rep. 45. In an action against a railroad company for the death of a brakeman in its employ, who was thrown from the top of a moving car by the breaking of a brake-staff while he was setting the brake, special findings of fact by the jury that the car was a foreign car received for transportation by defendant; that inspections made at different times by defendant failed to disclose any defect in the brake-staff, and that the defects could not have been discovered without taking the brake-staff off the car and striking it with a hammer, does not give rise to an inference that defendant had knowledge of the defect, or that it could have acquired such knowledge by reasonable diligence, and a judgment in plaintiff's favor on such findings is error. *Chicago, St. L. & P. R. Co. v. Fry*, 181 Ind. 819; 28 N. E. Rep. 989. The mere fact that the car was in defendant's possession for two weeks is not of itself sufficient to charge defendant with notice of the defect, where there is nothing to show that there was anything so unusual in the appearance of the car when it was received by defendant as to call for an extraordinarily careful inspection. *Ibid.* The brakeman, who was notified to go out on the trip only half an hour before the train started, on a dark and cloudy night, and who had only a limited opportunity to make a personal inspection of the train, was not chargeable with notice of the defect in the brake-staff. *Ibid.*

CLEVELAND, C., C. & ST. L. RY. CO. v. KEELY.

(Supreme Court of Indiana, May 11, 1894.)

1. RAILROAD COMPANIES. ACCIDENT AT CROSSING. CONTRIBUTORY NEGLIGENCE. CLIMBING BETWEEN CARS. Where a boy eleven years old has been standing in the rain fifteen minutes while a train was switched back and forth across a street, finally coming to a stop with a coupling directly opposite where he stood, it is not negligence for him to pass between the coupled cars, he having seen the engineer leave his engine, and being directed to pass through such opening by the flagman in charge of the crossing.

2. IMPUTABLE NEGLIGENCE. PARENT AND CHILD. In an action by a boy of eleven for a negligent injury to himself, it is unnecessary to allege due care on the part of his parents.

8. NEGLIGENCE OF COMPANY. It was negligent for a railway company to occupy a street crossing with a train for fifteen minutes, to the exclusion of public travel, and then, after the engineer had left his post, to start the train without warning persons who had been waiting in the rain for a chance to cross, including school children, who had long been permitted to pass through standing trains at that point.

ACTION by Winfield R. Keely against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company to recover damages for personal injuries. There was a judgment for plaintiff, and defendant appeals.

John T. Dye and Baker & Daniels, for appellant. *W. V. Rooker*, for appellee.

HOWARD, Ch. J. This was an action for personal injuries, brought by the appellee against the appellant. The material allegations of the complaint are that on the 9th day of November, 1891, the appellant company was operating a line of railroad extending along Louisiana street, and across New Jersey street, in the city of Indianapolis; that on said day the appellee was, and now is, an infant eleven years of age, a pupil attending the public schools of said city, and residing with his parents on the west side of said New Jersey street, and north of said line of railroad; that the public school at which he was a pupil was situate on New Jersey street, and south of said line of railroad; that the roadway of New Jersey street, at and near the railway tracks, was obstructed and impassable to appellee by reason of the accumulation of filth thereon, and of debris from certain public works and improvements thereabouts then in progress; that on said day he was on his way homeward to his dinner at the noon hour of intermission of said school, and had passed northward along the west sidewalk of New Jersey street until he arrived at the point of crossing the railroad tracks, where he found the appellant was wholly obstructing said street intersection with a locomotive engine and train of cars, which the appellant's servants were moving to and fro along said Louisiana street tracks, and across New Jersey street, in the act of switching said cars, and distributing the same upon the yard tracks on the west of the New Jersey street intersection; that it was then and there a violation of an ordinance of said city to obstruct said street intersection

with said cars or locomotive engine for more than three minutes at any one time, except in case of accident ; that on said occasion there was no accident, but said obstruction was maintained for a long time, to wit, fifteen minutes, by reason of the moving to and fro of said train for the purposes, and in the manner, aforesaid, so that the further progress of appellee was then and there delayed for fifteen minutes ; that, during all the time that appellee was so halted and delayed on the south side of said tracks, a cold and heavy rain was falling, and the appellee had begun to suffer, and was suffering from the exposure to which he was subjected ; that, after appellee had been so delayed for fifteen minutes, the appellant's servants halted said train so that an aperture or opening of coupling in said train, as it was then connected together, was directly in front of the sidewalk where appellee was so delayed ; that, upon halting said train, the engineer thereon abandoned his usual post on the locomotive engine and, apparently to appellee, went away ; that appellant then and there maintained a flagman, whose duty it was to direct persons as to their crossing said tracks ; that appellant well knew of appellee's situation ; that appellee, being in great haste, and in fear of punishment if further delayed, and being in distress from said exposure, and believing it was the duty of the flagman to direct him across said tracks as he had, under like circumstances, previously done and assisted to do, and relying upon the superior wisdom, experience and discretion of said flagman, and of the apparent absence of said engineer, as appellant well knew, appellee, pursuant to the recommendation and direction of said flagman then and there given, undertook in a careful manner to cross the said tracks through said coupling, aperture and opening, and, while he was so doing, appellant's servants, though they well knew appellee's situation, negligently, carelessly and wrongfully set the said locomotive engine and cars in motion, by reason of which, and without any fault on his part, the appellee's left foot was caught, crushed and mangled, and he has suffered great bodily pain and mental anguish, and is permanently disfigured, crippled and disabled — all to his damage, etc. On the overruling of a demurrer to this complaint, the appellant answered in general denial, and the cause was submitted to a jury for trial. The evidence on the part of the plaintiff (appellee) having been concluded,

counsel for the defendant (appellant) moved the court for a nonsuit, and asked the court to instruct the jury to return a verdict for the defendant on the evidence of the plaintiff. This motion was argued in the absence of the jury and, on the reassembling of the jury, was overruled by the court. Thereupon the defendant filed its demurrer to the evidence introduced by the plaintiff, in which demurrer the plaintiff joined. Upon the demurrer so filed to the evidence by the defendant, and the joinder therein by the plaintiff, the court delivered its instructions to the jury, and directed a verdict assessing damages only, and, after argument by counsel, the jury returned an assessment of damages in the sum of \$4,000. The court then overruled the demurrer to the evidence, and rendered judgment on the verdict. The errors assigned on the appeal are (1) the overruling of the demurrer to the complaint; (2) the overruling of the motion to instruct the jury to return a verdict for the defendant; (3) the overruling of the demurrer to the evidence; (4) the rendering of judgment on the verdict.

Counsel for the appellant suggest, rather than argue, that the complaint is deficient. The case of *Railway Co. v. Pinchin*, 112 Ind. 592; 13 N. E. Rep. 677, is cited to prove that one who attempts to pass between the coupled cars of a freight train standing temporarily across a street, and either knows, or might know, that the train is likely to move at any moment, is guilty of contributory negligence. But in the case before us it does not appear from the complaint that the appellee either knew, or might know by the use of his faculties, that the train was likely to move at any moment. On the contrary, after standing in the rain for fifteen minutes, waiting while the train moved to and fro across the street, he perceived that the train came to a halt with an aperture or opening of coupling directly in front of the sidewalk where appellee stood. At the same time appellee saw the engineer leave his post on the engine. The flagman also, placed there to aid travelers to pass the track in safety, directed him to cross through the opening. This the flagman had, under like circumstances, previously done, and appellee relied upon the experience and discretion of the flagman, as well as upon the abandonment of his station by the engineer, and so undertook the passage in confidence. The two cases are quite dissimilar.

It is also intimated, though not seriously urged, that the complaint should have alleged due care on the part of the parents of appellee. In *Railroad Co. v. Vining*, 27 Ind. 513, it was correctly said that "the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parent." The child in that case was seven years of age, and the court accordingly held that the allegation in the complaint that the parents were without fault was proper and sufficient. A like ruling was made in *Railroad Co. v. Huffman*, 28 Ind. 287, where the child was but five years old, and it was held that the complaint should have alleged due care on the part of the parents. In the case which we are considering, the appellee was eleven years of age, and was a pupil in attendance upon a school upon the same street upon which his parents lived, and going to and from which he crossed this track many times a day. In *Downs v. Railroad Co.*, 47 N. Y. 83, a boy twelve years of age, traveling upon a train with his mother, and not finding room in the car with her, was allowed by her to go into another car, and afterwards, in leaving the other car, he was injured, and it was held not to have been negligence on the part of the mother to have let such a boy go from her into the other car. The appellee in this case is suing for his own injury. He was capable of going, himself, to school across the railroad, and his parents are not in the case, nor is it necessary that they should be. Besides, the facts alleged show that there could be no negligence on their part. They were not at fault for letting such a boy attend school on the same street as their home, even if he had to cross a railroad when coming home to dinner. In such a case it is sufficient to aver, as the complaint here does, that the party injured was himself guilty of no negligence which contributed to the injury. *Railroad Co. v. Boland*, 53 Ind. 398. Contributory fault need not be denied when the facts stated show that there was no such fault. *Duffy v. Howard*, 77 Ind. 182; *Manufacturing Co. v. Millican*, 87 Ind. 87.

In their argument against the overruling of the demurrer to the evidence, counsel for appellant contend that appellee was guilty of contributory negligence, and that appellant was not guilty of negligence, as shown by the evidence. The evidence

shows: That the appellee was on his way home to his dinner from school, the school being south of the railroad tracks, and his home north, both on the same street. That he arrived at the tracks about ten or fifteen minutes after noon, and found a train standing over the crossing. That it was raining very hard. That he stood waiting on the sidewalk five or six minutes. That the roadway at that point was ankle deep with mud and filth caused by work going on near by — the building of a viaduct. That the train moved east at first, part of a square, not clearing the crossing; then backed up, and stood still four or five minutes. That the engineer left his place on the engine. That there was a flagman at the crossing, and, when the engineer left his place, appellee asked the man if he would have time to go through, and the flagman replied, "Yes; plenty of time; skip through;" and appellee started as directed. That he could not put his foot on the bumper — it was too high — and he put it in the link, and, as he raised the other foot, the cars started up and mashed his foot. The appellee had several times before, when going to and from school, and the crossing was blocked by a train, been directed by the flagman to go through, and had always gone through all right. The court held this and other corroborating evidence sufficient to show that appellee was without fault, and we cannot see that there was any error in such holding. Appellee had stood a long time in the November rain, patiently waiting for a passage home to his dinner. He had often before, when on his way home from school, and the train was on the crossing, by direction of the flagman, gone safely through. It was with him not a question of danger, but one of time. The train was standing for several minutes. The engineer had left his post, and the flagman had told him there was plenty of time; to skip through. Having waited so long in patience, taken all precautions, and been directed by the man placed there in authority, and whose discretion and experience were known to appellee from like previous occasion, he could not, as we think, be charged with negligence in acting as he did. An appearance of safety was created by the train brought to a halt, the engineer away from his place, and the flagman's direction to go through, coupled with the former crossings in safety. Such appearance of safety created by the railroad

company justified the appellee's action. *Railroad Co. v. Boggs*, 101 Ind. at page 527, and authorities there cited.

Much of what has been said as to absence of negligence on the part of the appellee is applicable also, as showing negligence on the part of appellant. It was, besides, negligent in the company to occupy the street crossing, to the interruption of public travel on a thoroughfare, for so long a time as fifteen minutes, and after standing still across the street and sidewalk, and the engineer leaving his post, then to start back suddenly without warning, with persons waiting so long on either side as shown in the evidence, particularly children going to and returning from school, who had for a long time been allowed to cross through standing trains at that point. This evidence and the witnesses were all before the court, and the court, hearing it, deemed the evidence sufficient to show negligence on the part of appellant. To us, the ruling seems reasonable. The engineer had kept his train so long upon the crossing, and at length stood it still over the street and sidewalk, himself also leaving his post upon the engine, could not but know the public character of the street and observe the persons on each side, including school children, waiting in the cold heavy rain, impatient at delay at the dinner hour, nor could he avoid perceiving the deep mud-covered street. Ought he to return suddenly to the engine and, without a note or word of warning, push back his train among those men, women and children, careless of danger to them? We have said little of the youth of appellee. But, as said by ELLIOTT, J., in *Binford v. Johnston*, 82 Ind. 426, "the age of the child is always to be taken into account;" and in the same case Lord ELLENBOROUGH, in *Townsend v. Wathen*, 9 East, 277, is quoted as saying that "every man must be taken to contemplate the probable consequences of the act he does." The carelessness of the flagman is conceded, but we think it also clear that the trainmen proper were likewise guilty of negligence. The demurrer to the evidence was properly overruled, and the judgment is affirmed.*

Accidents at crossings—climbing between cars while obstructing crossing.—The case of *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 479; 55 N. W. Rep. 53, is almost precisely similar to the principal case. The plaintiff, a boy of eleven years of age, had been sent upon an errand by his parents,

* Reported in 37 N. E. Rep. 406.

which required him to cross the defendant's tracks. The crossing in question was near a yard, and was much used in switching and making up trains, and the crossing was frequently a long time blockaded, so that persons desiring to cross had to pass under or between the cars, or go several blocks out of their way. It had become a common practice for pedestrians to pass under or between the cars, and this practice was well known to the trainmen. On the occasion in question, the plaintiff had waited for some time to pass, when the cars came to a stop, and the plaintiff, seeing that the engineer was looking at him, attempted to climb between the cars, thinking that the engineer would give him time to do so. But, as he stepped upon the coupling link, the train was started and his foot was crushed. It was held that the questions of negligence and contributory negligence were for the jury, and that a finding in favor of the plaintiff was sustained by the evidence. See, also, *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 93; 13 S. W. Rep. 893, and cases cited in 6 Am. R. R. & Corp. Rep. 155, note 6; 4 Am. R. R. & Corp. Rep. 442, note 3.

LOUISVILLE & N. R. Co. v. POPP.

(Court of Appeals of Kentucky, October 24, 1894.)

1. RAILROAD COMPANIES. INJURY TO TRESPASSER ON CARS IN YARD. LIABILITY OF COMPANY. Where a railroad company allows two passenger cars to remain on a side track near its depot and along a public street, the doors of the cars being open, and where it appears that children of all ages were in the habit of going about the depot and adjacent grounds for pastime and amusement, and that this practice was known to the defendant's servants, it is negligence to back other cars against those so left standing, for the purpose of coupling, without seeking to ascertain whether there are any persons in the cars, though no persons had a right to be in such cars.

2. INSTRUCTIONS. In such case, where plaintiff was on one of the cars and was injured by the coupling, a charge that if defendant's employees knew or "had cause to believe," that plaintiff was on the cars, and failed to exercise ordinary care, and the accident was the result, the verdict should be for plaintiff, is proper, as the phrase "had cause to believe" could not be understood as meaning other than reasonable grounds to believe.

3. EFFECT OF PLAINTIFF BEING A TRESPASSER. Although plaintiff was technically a trespasser, yet, where an injury is the result of nonperformance or violation of a plain and manifest duty for protection of human life or safety, the party thus acting will not be heard to say, in justification, that the person thus injured was merely a trespasser.

4. EXCESSIVE DAMAGES. It appeared that the plaintiff, an infant between five and six years old, had his leg crushed, necessitating amputation above the knee. It was held that a verdict for \$10,000 was not so excessive as to justify interference therewith.

ACTION by Anthony Popp against the Louisville and Nashville Railroad Company for personal injuries. Judgment was rendered for plaintiff, and defendant appeals.

Lyttleton Cooke and Helm & Bruce, for appellant. *Barton Vance, Augustus E. Willson and W. W. Thum*, for appellee.

LEWIS, J. Appellee, an infant between five and six years old, brought this action by his father and next friend to recover damages for injury to his leg, necessitating amputation above the knee, which was caught between a passenger car in motion and what is called a "bumper," placed at the end of a railroad track in Louisville owned by appellant. The injury was done, according to a map filed, about five feet from Second street, and 155 from west end of the passenger depot building, which is about 200 feet long by 20 wide, and situated north of Water, between First and Second streets. A passenger platform extends from First to Second street, that at its eastern end is about thirty-five, and on each side of the depot building seven and one-half feet wide. To a line distant from west end of the building twenty-five feet the platform is also thirty-five feet wide, but from there to Second street only ten, the remaining space north of and between it and the track, at the end of which is the bumper mentioned, being used for an open roadway that extends from Second street to the line referred to. On the south as well as the north side of the depot building is a railway track, at usual distance from edge of the platform, and used exclusively for passenger traffic. There are five other tracks further north, likewise extending to Second street, or very near it, one of which — the most northern — runs directly into or through a freight depot building situated east of First street. The others intersect the two passenger tracks at unequal distances east of that street, and on them are put idle passenger cars, though neither one of those tracks is adapted or used for transportation of passengers. The evidence shows that two cars had been placed and left stationary on that passenger track north of the depot building, the west end of one of them being near to the bumper; but precisely how long it had been done before appellee was hurt does not appear, though

they were there when a Shelbyville train was backed to the depot building on that track, and remained there after it left. It, however, appears they were put there for the purpose of being attached to, and forming part of, an excursion train that left the station about four P. M. on a Sunday ; and it was in the process of making up or completing that train, by coupling to the two stationary cars four others backed on the track by a switch engine, when appellee, at the time on the platform of that one nearest the bumper, received the injury complained of, and for which the jury returned a verdict in his favor for \$10,000.

The ground relied on for the reversal is error of the lower court in giving and refusing instructions. The first of them given which we will consider is as follows: "If the jury shall believe from the evidence that the agents and employees of the defendant, or any of them, knew or had cause to believe that plaintiff or the children who were with him was on either of the two cars which were standing on defendant's track near Second street, and failed to exercise ordinary care to protect them from harm when said cars were coupled with the train, and that, by reason of the failure of said agents or employees to observe ordinary care, the plaintiff sustained the injury of which he complains, then the law is for the plaintiff, and the jury should so find." It seems to us that instruction involves no more than the simple proposition, often approved by this court, that it is the duty of those operating a railway train to use reasonable effort to avoid injuring even a trespasser when his peril is, or by diligent attention to and proper conduct of the business they are engaged at might have been, discovered in time to prevent it. And such diligence and attention is especially imperative in a case like this ; for though, ordinarily, a person of matured experience and capacity might safely remain on the platform of a car while being coupled to others, it would be extremely perilous for a child five or six years old to attempt doing it, or even to go near them. It is true the evidence does show that the engine and four cars were backed at the rate of only two miles per hour ; but, however slow may have been their movement, it was inevitable that the two stationary cars would be jarred and pushed suddenly back, as did occur, with the result of crushing appellee's leg. The phrase "had cause," used in the instruction, we think

could not have been understood by the jury as meaning other than reasonable grounds to believe, and was, therefore, not prejudicial to appellant.

But it is contended there was no evidence tending to show those in charge of the train either knew or had cause to believe appellee was then on or near to either car. It appears that he, accompanied by three other boys about his age, except one who was nine years old, on their way, though not by the most direct route, home from some place east of First street, stopped on the platform at the eastern end of the depot building, whence they were driven by the baggage master. A passenger for the Shelbyville train, before leaving, also tried to induce them to go off, and another employee (probably engineer of that train) endeavored to frighten them away by threat to carry them to the country. But instead of leaving the premises they went to west end of the platform, and finally into the car, for the purpose of getting ice water, which was given to them by two men who, there is some reason to believe, though not satisfactorily shown, were employees of appellant. After getting the water they loitered about the car, appellee remaining on the platform of it, until the engine and four cars attached were backed on the track in order to make the coupling. The proof is that the bell was ringing as the train backed, and thereby is afforded some confirmation of the statement of a witness, who was at that time on opposite side of Second street, that appellee, seemingly frightened at the coming collision, called some person to help him off the platform, and, to escape the danger, endeavored to get on the bumper. There is no direct evidence that those in charge of the backing train, or any other employee, actually saw him on the car platform in time to avoid injuring him; and whether they had reasonable grounds to believe he was there we will consider in connection with the following instruction: "The facts that the said two cars were standing upon the track uninclosed, and that the plaintiff was injured upon one of them, are not sufficient of themselves to render the defendant liable in this action. But it was the duty of the defendant to exercise ordinary care with regard to said cars, to prevent injury to any one by them; and if the jury shall believe, from all the facts and circumstances admitted in evidence, that the defendant or its agents or employees failed to exercise

ordinary care to prevent injury to others by said car, and that the injury which plaintiff sustained would not have been received by him but for the failure of said employees to observe ordinary care with respect to said cars for the safety of others, then the law is for plaintiff, and so should the jury find."

There is, in our opinion, no difficulty in determining whether, as a question of law, the servants of appellant exercised due care to prevent injury to appellee, for the legal rights and duties of railroad companies have been heretofore, in analogous cases, fully and clearly defined. A railroad company has the right to exclusive use and occupation of its private yards and tracks, except at crossings, and is not bound, at such places, to look out for intruders and trespassers; otherwise, it could not properly perform its duty to the public. *Railroad Co. v. Gastineau*, 83 Ky. 119; *Conley v. Railroad Co.*, 89 Ky. 402; 12 S. W. Rep. 764; *McDermott v. Railroad Co.*, 93 Ky. 408; 20 S. W. Rep. 380; *Railroad Co. v. Hurt*, (Ky.) 13 S. W. Rep. 275. But the place where appellee was injured is not, in meaning of the cases cited, the private yard of appellant, where others than employees have no right, nor can be reasonably expected, to go, and where, as a legal consequence, there is no obligation to look out for them. It is not a place where turntables are placed and used, as in the *McDermott* case, nor where trains are usually and can be safely made up or cars coupled, as in the *Gastineau* case, nor where switching trains and changing cars are properly done, as in the *Hurt* case. On the contrary, the track in question is near enough to the depot platform for passengers to step off and on cars, within less than eight feet of the depot building, where the traveling public, composed of men, women and children, resort, and actually contiguous to and parallel with the open roadway from Second street; so that, where appellee was injured, children or adults might go without obstruction upon that track, or even into the cars left standing thereon. And that children of all sizes were in the habit of going about the depot building and grounds for pastime and amusement was known to servants of appellant, as they testified. Moreover, the fact that appellee and companions went into the car on their own motion to get ice water shows that they were familiar with the premises. Therefore, while, as the lower court substantially instructed the jury,

appellant was not legally bound to inclose its depot building and grounds, and leaving the two cars standing upon that track was not of itself negligence, still it was so manifestly dangerous to couple them at that place, and under existing circumstances, to the backing train, that active vigilance on part of the employees was required in order to prevent injury to others. And failure to exercise it must, consistently with decisions of this court in other cases, be treated as gross negligence; for it has been held that to move, or permit to be moved, either a train or single car on a side track in a city or town where the public may go by license or custom, without a servant being in possession to give warning of its approach and to control its movement, is, where death results, willful negligence, in meaning of the statute on that subject. *Shelby's Admr. v. Cincinnati, N. O. & T. P. R. Co.*, 85 Ky. 224; 3 S. W. Rep. 157; *Conley v. Same*, 89 Ky. 402; 12 S. W. Rep. 764; *Railroad Co. v. Potts*, 92 Ky. 30; 17 S. W. Rep. 185. And we see no reason why that rule should not apply in this case; for the employees undertook, not merely to back the train upon a track near the passenger platform, which is always dangerous where the premises are uninclosed, but to make up or complete the train by coupling it to two stationary cars within a few feet of the depot building, which at best is very narrow and contracted for a city like Louisville. It is true, there was a brakeman on the western end of the moving train; but he was there simply to make the coupling, and could not see whether there were persons on either of the two stationary cars, or near to them. The company had employed, at that time, a station master and watchman, both of whose services it must be presumed it deemed, and in our opinion was, necessary on such occasion; but neither of them was present to give warning of the peril of appellee and his companions, or aid in preventing injury to them. So, while the evidence conduces to show no employee of appellant was aware of the presence of appellee, it cannot be assumed they did not have reasonable grounds to believe he or some other person, infant or adult, might be in peril; much less can it be assumed it was not the legal duty of appellant to have some employee in a position on the platform or train to see to it there was no person in danger of being injured by the collision. Technically, appellee was a trespasser, but, as said in the *Conley*

case, where an injury is the result of nonperformance or violation of a plain and manifest duty for protection of human life or safety, the party thus acting will not be heard to say, in justification, that the person thus injured was merely a trespasser. We do not doubt the applicability of that principle to this case, for, obviously, to attempt backing a train and coupling cars at the place and under the circumstances it was done when appellee was injured is violation and disregard of a plain duty.

There is another aspect in which the conduct of appellant's employees shows negligence of a reprehensible character. It was known to them that children of all ages were in the habit of resorting to the depot premises, yet not only were the two cars coupled to the backing train without any servant being in a position to warn appellee of his danger, but one of the cars, if not both, were left open, so as to invite and tempt children to enter, as appellee and companions did do, and if the two men who gave them water were not actually employees, the fact is thus made apparent that the cars were left so open and exposed that any one, child or adult, might enter at will, no employee being present to prevent, or warn them of the coupling process that would and did shortly take place. In *Branson v. Labrot*, 81 Ky. 638, it was held that conduct which, towards the general public, might be up to the standard of due care, may be gross or willful negligence when considered in reference to children of tender age and immature experience, and a case in 9 East, 277, was cited in support of the doctrine, where this language was used: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instinct, might run into it and be killed, and which would exempt him from liability for the consequences of having exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle by instincts equally as strong, might thereby be killed or maimed for life. Such is not the law." In our opinion, if appellant elected to keep uninclosed its passenger depot and adjacent premises, so that children might go there, and, tempted by curiosity or thirst, wander upon its railway tracks and into its cars, it was the duty of its employees to know appellee's position and danger, and to be in a position at the

proper time to protect him from injury by its moving trains and cars, especially as it was improper to couple cars on that track and at that place.

The only case in which this court is authorized to reverse a judgment on account of excessive damages is when, as provided by the Civil Code, the verdict appears to have been rendered under influence of passion or prejudice. In cases heretofore decided by this court, where the injury was not greater than that received by appellee, verdicts for as great amount have been sustained, and we see no reason for now departing from such precedents. Judgment affirmed.*

RAILROAD COMPANIES—INJURIES TO TRESPASSERS.

1. **Injuries to children playing or being about the cars, yards or track.**—The case of *Louisville & N. R. Co. v. Hunt*, (Ky.) 18 S. W. Rep. 375 (1890), would seem to be somewhat inconsistent with the principal case. The plaintiff, a boy of eleven years of age, had climbed upon a coal car standing upon a side track at a railroad depot and was knocked off and injured by other cars being backed against it. The company's servants did not know of his presence upon the car and had taken no precautions to ascertain whether anybody was on the car or not. It was held that the defendant was not liable. Evidence that there was no railing between the depot and the side track; that persons were in the habit of crossing such track, and that no signal was given before backing the train up, was held to be incompetent. The court said: "The employees had no reason to anticipate the presence of boys in their freight cars, either during the day or night, nor were they required to examine for the purpose of ascertaining whether the boys were on any part of the train. If they saw the boys, it was their duty to make them leave the car, and to exercise that degree of caution as would prevent them being injured; but the fact that they might have seen them constitutes no neglect on their part, as it was not incumbent on them to know who had climbed into their cars; or whether any one was in them before moving them."

A railway company is not ordinarily obliged to keep a lookout for trespassers, whether adults or children, on its cars or track, nor to presume that they will expose themselves to danger thereon, but, having notice of their presence, and that they are in danger, its servants controlling the movements of its cars or machinery are bound to use reasonable care to avert it. *Hepfel v. St. Paul, M. & M. R. Co.*, 49 Minn. 263; 51 N. W. Rep. 1049. In this case a child of twelve years climbed on the ladder of a freight car and was killed by coming in contact with a pile of lumber. There was evidence tending to show that a brakeman on the train was aware of her position or intention to board the train. It was held that the questions of negligence and contributory negligence were for the jury.

A railway company maintaining what is known as a "gravity" yard or

* Reported in 27 S. W. Rep. 992.

side track has undoubtedly performed its duty as to a trespassing child of tender years, when it securely fastens by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track, although such track is located through ground used as a sort of common, and it is known to the employees of the company that children are in the habit of loosening cars so left and send them down the grade. *Haesley v. Winona & St. P. R. Co.*, 46 Minn. 233; 48 N. W. Rep. 1023.

In an action against a railroad company for occasioning the death of a boy eleven or twelve years old, the evidence was that the sectionmen, when they quit work, left their handcar unlocked and unguarded at the foot of an embankment four or five feet below the level of the track, and at a point a quarter of a mile from any house; that deceased was attracted by some boys, who had lifted the car upon the track, and were running it to and fro, and that he came to his death by jumping or falling from it when it was descending a grade at high speed. One of them testified that he and others had used the car eight or ten times before, with the permission of the "boss," when the men were there at work, but that he had never given them permission when the men were not there. The car weighed 600 or 700 pounds. Held, that it was not a thing dangerous in itself, and the company was not negligent in leaving it unlocked beside the track. *Robinson v. Oregon, S. L. & U. N. R. Co.*, 7 Utah, 493; 27 Pac. Rep. 689.

A declaration alleging that defendant left a freight car standing on one of its tracks, and negligently allowed the door, which it knew was not properly attached to the car, to remain open and unlocked, knowing that it would be an enticing object to children, and that plaintiff, eleven years old, traveling on the street in the vicinity of the side track, saw the car with its door open, and was thereby enticed to look into it, and in so doing carefully touched the door, which fell upon him, states no cause of action. *McEachern v. Boston & M. R. Co.*, 150 Mass. 515; 23 N. E. Rep. 231.

Mere knowledge by a railroad company or its servants that numerous persons, including children, without any public or private right of way, passed daily and hourly through its yard, situate in or near a populous part of the city, and crawled under stationary cars occupying its tracks, will not render it liable for an injury accruing to a child by a sudden and involuntary movement of a long line of such cars, resulting from the negligence of the company's servants in handling other cars several hundred yards distant from the scene of the accident, such other cars rolling against the standing cars and setting them in motion while the child was passing under one of them. *Central R. & B. Co. v. Rylee*, 87 Ga. 491; 13 S. E. Rep. 584.

Where a day watchman in the employ of receivers of a railroad company fails to use ordinary care in removing a boy from a moving car on which the latter is riding in violation of a city ordinance making such act a misdemeanor, the receivers are liable for any injuries to the boy caused by the negligence of such watchman. *Brill v. Eddy*, 115 Mo. 596; 22 S. W. Rep. 488. In an action by the boy to recover for such injuries it appeared that the watchman had only one arm; that the boy was hanging on the ladder on the car; that when the car reached the watchman he pulled plaintiff off, when he fell, and was injured. Held, that the issue of negligence was for the jury. *Ibid.*

It is not negligence for a railroad company to omit to keep a lookout to prevent boys from swinging on the ladders of its slowly moving freight trains. *Catlett v. St. Louis, I. M. & S. R. Co.*, 57 Ark. 461; 21 S. W. Rep. 1062.

Defendant's servant in charge of a gravel train hauling ballast for a side track near a depot, took plaintiff, a seven-year old boy, on the train with him. The train being side-tracked, and a freight train approaching on the main track, plaintiff said that he wanted to go home, and said servant advised him to get on the freight train. Plaintiff got on a heap of gravel, about two feet high, between the tracks, and caught hold of the caboose. As he did so, the gravel slipped under him, and he was caught by the wheels. Held, that the railroad was not liable for that its agents had negligently failed to keep plaintiff off its grounds, and had not used ordinary care to prevent his injury when he was there. The servant's advice to him was not within the former's scope of employment, and, this being the proximate cause of the injury, plaintiff could not recover. *Keating v. Michigan Central R. Co.*, 97 Mich. 154; 56 N. W. Rep. 846.

2. Turntable cases — injuries to children.— Where a child six years old was injured on a turntable of a railway company, while playing with other children, no employees being about, and the turntable was only kept in place by an ordinary iron latch, which could be easily lifted, the company is liable for injuries received by the child while the table was turned by other boys, even though the employees of the company had always ordered children away, when observed playing on the turntable. *Callahan v. Eel River & E. R. Co.*, 92 Cal. 89; 28 Pac. Rep. 104. A railroad company is liable for injuries received by a child while playing upon a turntable upon its premises near a public street, which was not protected by any inclosure, nor guarded by its employees, though it was provided with the customary fastenings to keep it from revolving, and the child was invited to play thereon by other children. *Barrett v. Southern Pac. R. Co.*, 91 Cal. 296; 27 Pac. Rep. 666. See, also, *Bates v. Nashville, C. & St. L. R. Co.*, 90 Tenn. 86; 15 S. W. Rep. 1009; *Gulf, etc., R. Co. v. McWhirter*, 8 Am. R. R. & Corp. Rep. 158, and note; *Daniels v. New York & N. E. R. Co.*, 5 Am. R. R. & Corp. Rep. 61, and note.

3. Trespassers on train, injury to, expulsion, etc.— A person attempting to steal a ride on a freight train is not a passenger, and the railroad company, as a common carrier, owes him no duty, though the company has no right, recklessly and wantonly, to inflict injuries on him. *Planz v. Boston & A. R. Co.*, 157 Mass. 377; 32 N. E. Rep. 356. In an action for personal injuries caused by being forced to jump from a moving train, it appeared that plaintiff was stealing a ride on defendant's freight train; that he knew he had no right thereon, and that he incurred peculiar risks in so riding; that he was first ordered off when the train was just starting, but he refused to get off; that he could have prevented jumping when he did, by passing to the car next ahead of the one on which he was riding. Held, that plaintiff was guilty of contributory negligence in getting on the train, in remaining after first ordered off, and in jumping when he did, and could not recover. *Ibid.*

Where plaintiff, who was not in the employ of defendant railroad company,

was riding on its timber train, on which no persons were allowed to be carried, except the trainmen, and he was not there by invitation of any one who had authority to invite him, and had not paid any fare, and was injured in a collision between such train and another train of defendant, he was not entitled to recover, if the negligence of defendant's trainmen causing the accident was not wanton or willful. *Illinois Central R. R. Co. v. Meacham*, 91 Tenn. 428; 19 S. W. Rep. 232.

Plaintiff was injured while traveling on defendant's freight train, and claimed that he was a free passenger on such train, as part owner of a carload of stock being transported by defendant. The evidence showed that the stock was owned by one G., with whom the contract of carriage was made, and whose name alone appeared in the bill of lading, and who was alone entitled, under the contract, to free transportation. Plaintiff's only claim to the stock was a verbal agreement with G. to buy part thereof after reaching their destination, if he could give proper security. Held, that plaintiff was a trespasser on defendant's train, and could recover only for injury caused by the wantonness or willfulness of defendant's servants. *Richmond & D. R. Co. v. Burnsed*, 70 Miss. 437; 12 South. Rep. 958.

Although plaintiff got on a train knowing that no passengers were allowed on it, and though it was the duty of the brakeman to put him off, still if the latter, in the discharge of that duty, willfully assaulted and beat plaintiff, merely because he declined to get off while it was running at a rate of speed rendering the attempt hazardous, the company would be liable for punitive damages. *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45; 9 South. Rep. 303.

4. Trespassers on track.—In an action against a railroad company for the death of a trespasser upon its track, the evidence showed that the train which committed the injury was running thirty-five miles an hour in a crowded portion of a large city, in violation of a city ordinance; that at the place where the accident occurred the track was unguarded, and appeared to be on a public street, and was being crossed daily by pedestrians; that the engineer might have seen the deceased when the train was 125 feet distant; that no bell was rung; and that the whistle was not blown until the engine was about five or ten feet from the deceased. Held, that there was sufficient proof of such gross negligence as evidences willfulness to justify submitting the case to the jury. *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 596; 39 N. E. Rep. 692.

In an action to recover damages, the evidence showed that the engineer discovered deceased about midway of a trestle, 100 feet long, when the train was from 400 to 600 yards from deceased, and that the train could have been stopped within that or less distance, had the trainmen acted promptly, and that, after the discovery, the engineer acted upon the presumption that the deceased could reach the end of the trestle in safety, and did not attempt to stop until deceased attempted to retrace his steps. Held, that the conduct of the engineer was reckless and wanton, and would justify a verdict, notwithstanding that deceased was a trespasser, and guilty of contributory negligence. *Central R. & B. Co. v. Vaughan*, 93 Ala. 209; 9 South. Rep. 468.

Plaintiff's intestate was found, after dark, lying with his head resting on the end of a cross tie of defendant's track. It was supposed that he was

struck, while sitting on the cross tie, by an engine, which passed a short time before he was found. The engineer and fireman testified that they did not see intestate, and the former testified that the engine had a good headlight, and that he kept a constant lookout. There was evidence that intestate had been drinking that evening. Held, that if intestate carelessly, or in a drunken stupor, remained on the track until the engine struck him, or if he placed himself in the way of the engine and was killed, he was guilty of contributory negligence. *Norwood v. Raleigh & G. R. Co.*, 111 N. C. 286; 16 S. E. Rep. 4. If the engineer saw intestate on the track or sitting on a cross tie, and could have stopped the train, still he was justified in believing up to the last moment, in the absence of knowledge that intestate was deaf or insane, that he would move out of the way. *Ibid.*

Where plaintiff's intestate, while negligently on plaintiff's track, was killed by a train, and the trainmen neither knew of his perilous position in time to avoid the accident, nor were recklessly or wantonly negligent in not so knowing, plaintiff cannot recover. *Nave v. Alabama G. S. R. Co.*, 96 Ala. 264; 11 South. Rep. 891. Running a train at a high rate of speed, at a point where the trainmen have reason to think it likely that persons are on the track, as in a city or populous district, or failure to keep a lookout at such a point, is negligence which will render the railroad company liable for resulting injuries, though the injured person was guilty of contributory negligence, and the trainmen were without fault after they discovered his danger. *Ibid.*

Plaintiff's intestate was killed while walking on a railroad track. The deceased, who was a deaf-mute, had once before received an injury in a similar manner, and had been repeatedly warned about walking upon the railroad. Only a few minutes before he was killed he had been so warned. The accident occurred in an open plain, where the view was unobstructed for nearly a mile. Deceased, although a deaf-mute, was possessed of all his other faculties, including that of sight, and was a strong, active man, about thirty-two years of age. He was walking directly towards the train, on the ends of the ties, on the side opposite the engineer. The latter saw him until he came within twenty-five or thirty yards, when the projecting front of the locomotive intervened. He supposed, however, the deceased would step off. Held, that the deceased's own negligence was the proximate cause of the injury, and plaintiff was not entitled to recover. *Tyler v. Sites' Admr.*, 88 Va. 470; 18 S. E. Rep. 978.

Under the Public Statutes of Massachusetts, chapter 112, section 212, which provides for an action for loss of life through the negligence of corporations, except where the person killed was walking or being on a railroad track contrary to law, no action will accrue against a railroad company for the death of one who was at the time in a building erected without authority on the company's right of way, unless caused by the wanton neglect of defendant. *Dillon v. Connecticut River R. Co.*, 154 Mass. 478; 28 N. E. Rep. 899. In this case the train ran off the track and demolished the building in which the deceased was.

Where a person not an employee, without permission of a railroad company, and against its will, and without its knowledge, goes into a yard covered and interlaced with tracks, which are being used by the company by its

engines and cars, in switching, drilling and changing cars, such person is bound to use diligence commensurate with the peril in which he has placed himself; and if he fail to do this he cannot recover for any injury he may sustain from the running of the engines and cars of the company, and the company would owe such person no duty other than not to injure him if they saw him in time to prevent it. *Rome R. Co. v. Folbert*, 85 Ga. 447; 11 S. E. Rep. 849.

5. Effect of license, express or implied, to use tracks.—Where, by mutual consent, evidenced by practice and by acquiescence therein, with knowledge on the part of the superintending officers, two railway companies having their tracks adjacent and parallel, on some of which cars in large numbers are habitually left standing, permit the watchmen employed by the companies, respectively, to walk and stand upon the unoccupied tracks of each other, including the main lines, for the purpose of examining the standing cars with a view to take and report the initials and numbering inscribed thereon, a watchman while so employed, and deporting himself in the usual way, recognized as fit and proper by both companies, is not a trespasser upon the track of the company which did not employ him, any more than he is a trespasser upon the track of his own company. He is not a trespasser at all. And if, by the negligent and too rapid running of a train of the other company, he is suddenly stricken and injured, failing to protect himself in consequence of his attention being occupied with his duties, it is a question for a jury whether, under all the circumstances, he could have avoided the consequences of the company's negligence by the exercise of ordinary diligence. If he could not, he might recover; but if he could, he would have no cause of action. *Watts v. Richmond & D. R. Co.*, 89 Ga. 277; 15 S. E. Rep. 365. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa, 757; 45 N. W. Rep. 1065, is a similar case to the last.

Where persons have been accustomed for a long time to use a railway company's track as a towpath, and the company has never objected, such persons are not trespassers within the meaning of the Revised Statutes of Missouri, 1889, section 2611, forbidding persons to use railway tracks as highways. *Le May v. Missouri Pac. R. Co.*, 105 Mo. 361; 16 S. W. Rep. 1049. In an action against a railway company for causing the death of plaintiff's daughter, aged fifteen years, it appeared that, although deceased was by statute a trespasser in walking along defendant's tracks, yet many people habitually walked on the tracks at the place of accident. The train was running more than six miles an hour, in violation of a city ordinance, and no bell was sounded. The engineer saw the girl when about 600 feet distant, and blew the whistle when within about thirty-five feet of her. The evidence was conflicting as to whether the girl, when first seen by him, was walking on the track upon which the train was moving. Held, that a judgment for the plaintiff would not be disturbed. *Fiedler v. St. Louis, I. M. & S. R. Co.*, 107 Mo. 645; 18 S. W. Rep. 847.

In an action against a railroad company for the death of plaintiff's intestate, the evidence showed that the place where deceased was killed was in a town; that from lots fronting on the track defendant had built to the track plank bridges for foot passengers, and that there were three tracks, between

two of which was a wide way, on which persons might safely walk between moving trains. The court charged that a railroad company must use greater care in running trains through towns than in less populous districts, and that the fact that pedestrians were accustomed to travel on the track at a particular place, in the knowledge of defendant or its agent, made it its duty to use greater care in the operation of its road at that place. The court further charged that if the tracks where deceased was killed had long been used by the public, with defendant's knowledge and acquiescence, then deceased was not on the track as a trespasser, but as a licensee. Held, that such charges were properly given. *Norfolk & W. R. Co. v. Carper*, 88 Va. 556; 14 S. E. Rep. 328. The evidence showed that when the train which killed deceased whistled for the station, deceased was at a store on the south side of the track, about 100 yards from a point opposite to his dwelling, which was on the north side of the track; that a turnpike ran along the track past his house, which was as near a way to reach his house from the store as the railroad; that deceased crossed two of the three tracks diagonally, and got on the third track, on which was the train in full view, and turned slowly down the track towards the moving train. The engineer saw him, but supposed he had crossed the track. The fireman saw him as he came down the track, and informed the engineer, who made all possible efforts to stop the train, but could not before striking deceased. Held, that there was no negligence on defendant's part. *Ibid.*

WELCH V. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, August 17, 1894.)

1. RAILROAD COMPANIES. INJURY TO VOLUNTEER. LIABILITY OF COMPANY. One who has no interest in the work to be performed, who voluntarily assists the servants of a railroad company, either with or without their request, does so at his own risk, and the company is not liable for any injury to such person by reason of the negligence of such servants.

2. ONE HAVING AN INTEREST IN THE WORK NOT A VOLUNTEER. One who has an interest in the work to be performed, either as consignee or servant of a consignee, or in any other capacity, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants.

3. Where it appeared that the defendant corporation, while engaged in transporting earth by a gravel train for its own use, undertook to deliver earth from cars in the same train for the use of a third party, the crew in charge of the gravel train having requested the men employed by such third party to assist in dumping the earth out of the cars, and, while so engaged, one of the latter's crew being injured by a defective car that was improperly loaded, held, that the crew in charge of the gravel train had authority to make such request and give such consent as would authorize the servants of the consignee to remove, or assist in the removal of, earth from the cars.

4. **NOR A FELLOW-SERVANT.** Nor could the person injured be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground.

5. **EXCESSIVE DAMAGES. WRONGFUL DEATH.** Upon a motion to set aside a verdict for excessive damages, held, that if, under our statute, no more than \$5,000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of \$8,000 for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survived his injuries some six or seven months.

EXCEPTIONS from Supreme Judicial Court, Cumberland county.

Action on the case by Thomas Welch against the Maine Central Railroad Company to recover damages for personal injuries caused by defendant's negligence. There was a verdict for plaintiff, and defendant excepts, and moves for a new trial.

Harry R. Virgin and *A. A. Strout*, for plaintiff. *W. L. Putnam* and *Drummond & Drummond*, for defendant.

WALTON, J. It appears that the Maine Central Railroad Company, while engaged in transporting earth for its own use, undertook to deliver some earth for the use of Mr. H. N. Jose ; and the evidence tends to show that the crew in charge of the gravel train requested the men employed by Mr. Jose to assist in dumping the earth out of the cars, and that, while so engaged, a broken car, unevenly loaded, tipped over and fell upon one of Mr. Jose's men (Thomas Welch), and inflicted injuries of which he afterwards died. For these injuries the administrator of Welch has recovered a verdict against the railroad company for \$8,000 damages. The case is before the law court on exceptions and motion for a new trial. We will first examine the exceptions.

1. It is insisted in defense that it was the duty of the servants of the railroad company to dump Jose's earth out of the cars ; and that they had no authority to employ Jose's men to assist them ; and that Jose's men were trespassers in attempting to do so ; and that, being trespassers, the railroad company owed them no duty, and was under no obligation to protect them against the carelessness of its servants.

It is undoubtedly true that, if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the

servants of another, either with or without the latter's request, he must do so at his own risk ; and the jury were so instructed in this case. But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases, the master will not be responsible ; in the latter, he will be. This distinction is sustained by every text book to which our attention has been called, and is well sustained by adjudged cases.

Thus, in *Degg v. Railway Co.*, 1 Hurl. & N. 773, where a mere bystander, without any request from the servants of the railway company, volunteered to assist them in working a turntable, and was carelessly injured by the servants of the company, the court held that he had no remedy against the company ; and this case is approvingly cited in *Osborne v. Railroad Co.*, 68 Maine, 49.

But in *Wright v. Railway Co., L. R.*, 10 Q. B. 298, where the consignee of a heifer assisted in moving the car in which she had been brought, in order to hasten her delivery, and was carelessly run against and hurt, the court held that he had a remedy against the company ; that the rule established in the *Degg* case did not apply. To the same effect is *Holmes v. Railway Co., L. R.*, 4 Exch. 254 ; *L. R.*, 6 Exch. 123.

So, in this country, in *Railway Co. v. Bolton*, 43 Ohio St. 224 ; 1 N. E. Rep. 333, where a passenger on a street-railway car assisted in backing the car onto the track at a turnout, and was carelessly run against and hurt, the court held that the railway company was responsible, because the assistance rendered tended to expedite the passenger's journey, and prevented his being regarded as a mere volunteer.

So, in *Eason v. Railway Co.*, 65 Tex. 577, where, to facilitate the loading of lumber, it became necessary to move a car, and the shipper's servant, at the request of the conductor of the freight train, undertook to make the coupling, and was injured by the carelessness of the company's servants, the court held that the railway company was responsible, that the servant was not a mere volunteer, because the assistance which he undertook to render was to facilitate his own work, and thus promote the interests of

his employer. The rule of exemption and its limitations are very clearly stated in this case.

The distinction running through all the cases is this: That, where a mere volunteer — that is, one who has no interest in the work — undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of “*respondeat superior*” does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee or in any other capacity, and, at the request or with the consent of another’s servants, undertakes to assist them, he does not do so at his own risk, and, if injured by the carelessness, their master is responsible. In such a case the maxim of “*respondeat superior*” does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master’s servants.

This distinction is sustained by the cases cited, and by every modern text book to which our attention has been called, and we are not aware of a single authority which holds the contrary. The recent case of *Wischam v. Richards*, 136 Penn. St. 109; 20 Atl. Rep. 532, cited by defendant’s counsel, is not opposed to it. It sustains it. In that case the plaintiff was hurt while assisting the defendant’s servants in unloading a heavy fly wheel from a wagon. The court found, as a matter of fact, that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant’s servants in performing, and, consequently, that he had no remedy against their master. The court say that the plaintiff had no interest in the delivery of the wheel; that the delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant; that the participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant, and that this circumstance brought the plaintiff’s case within the rule of nonliability. “The distinction,” said the court, “is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it.” The fact that the plaintiff was a mere volunteer, having no inter-

est in the work which he undertook to assist the defendant's servants in performing, was the hinge on which the case turned, and defeated his right to recover. If the plaintiff had been sent to obtain the wheel, and, at their request or with their consent, had assisted the defendant's servants in unloading it, in order to hasten or facilitate his own work, and had been injured by their negligence, his right to recover would undoubtedly have been sustained. As already stated, the hinge on which the cases turn is the presence or absence of self-interest, or a self-serving purpose. In the one case he is a mere volunteer; in the other he is a person in the regular pursuit of his own business, a distinction very obvious and substantial.

Mr. Beach, in his work on Contributory Negligence (§ 120), says that where one assists the servants of another, at their request, for the purpose of expediting his own business or that of his master, and he is injured by the servants' negligence, the master is liable; that in such a case the relation of fellow-servant does not exist, and in case of injury the rule of "respondeat superior" applies.

Mr. Thompson, in his work on Negligence (Vol. 2, p. 1045), says that care must be taken to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of his master; for in such a case he will not stand in the relation of fellow-servant to them, and, if he is injured by their negligence, the doctrine of "respondeat superior" will apply, and their master will be responsible.

But in the present case it is urged by the learned counsel for the railroad company that the crew in charge of a gravel train have no authority to make such a request or give such consent as will authorize the servants of the consignee to remove, or assist in the removal of, earth from the cars.

We do not think that such a want of authority exists. It seems to us that the persons having the charge of freight are the very ones to give such consent or to make such a request; and it has been so held, both in England and in this country.

In Wright's case, L. R., 10 Q. B. 298, it was so held. In that case Mr. Justice FIELD said that the agent to deliver freight is

the proper person to give consent for the consignee to assist in its delivery. That was the heifer case already referred to.

And in *Lewis v. Railroad Corp.*, 11 Metc. (Mass.) 509, it was so held. In that case a truckman was permitted by one McCoy to assist in the removal of a block of marble from a car. The truckman was allowed to take the car to the depot of another railroad company, and there, by the use of the latter's derrick, to make the attempt to lift the block of marble from the car, and place it directly on his truck. But the attempt failed. The derrick gave way, and the block of marble fell, and was broken. This brought into litigation, directly and sharply, the authority of these two servants—one a servant of the railroad company, and the other a servant of the consignee—thus to change the place and manner of delivering freight. And precisely the same argument was urged against the authority in that case as is urged against the authority in this case. It was said that McCoy was in no sense a general agent of the railroad company; that his only authority was to receive and deliver freight; that his authority being thus special and limited, his consent to change the place and manner of delivering the freight was not binding upon the company. But the court held otherwise. The court held that the place and manner of delivering freight may always be changed by the servants of the carrier and the servants of the consignee; that their authority to make such changes is included in their authority to receive and deliver freight; that if the consignee of a bale of goods steps into a car, and asks for a delivery there, and it is passed over to him, the delivery is complete. The rule established by the authorities seems to be this: That the persons having authority to deliver freight and the persons having authority to receive it may always agree upon the place and manner of its delivery.

In the present case, the evidence tended to show that the railroad company, while engaged in grading a portion of its track in or near Portland, undertook to leave some earth at a point on the line of its road for Mr. Jose. Mr. Jose employed a contractor, by the name of Shannahan, to take the earth away. It appeared in evidence that, at the request of the railroad crew in charge of the gravel train, Shannahan's men had assisted in dumping the earth left for Mr. Jose out of the cars; and on the day of the accident,

when Shannahan's men came for more earth, the earth had been left in the cars, and the railroad men had gone on to where they were delivering earth for the use of the railroad. Consequently, Shannahan's men were obliged to dump the earth out of the cars themselves, or wait for an indefinite length of time for the return of the railroad men. It was a cold day in December, and to wait would be neither comfortable for themselves nor profitable for their employer; and so, for their own convenience and to facilitate their own work, Shannahan's men undertook to dump the earth out of the cars themselves. The decedent was one of them. The evidence shows that he was an experienced man at that kind of work. But one of the cars was defective, and had been improperly loaded, and it tipped over, and fell upon him, and inflicted the injuries of which, at the end of about seven months, he died.

The presiding justice instructed the jury that one who voluntarily assists the servants of another cannot recover from the master for an injury caused by the negligence or misconduct of such servants; that one cannot by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servants of another, at their request, for the purpose of expediting his own business or that of his master, for in such a case he will not stand in the relation of a fellow-servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch) consented to assist in dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing for Mr. Jose, he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made out in other respects; nor could he be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground.

These instructions were several times repeated, and not always in precisely the same words; but such were the substance and effect of the instructions.

Counsel for the railroad company profess to be greatly alarmed at the consequences of such a doctrine. What, they ask, will be

the limit of such a power? Where will the line be drawn? And they profess to believe that, if such a power is conceded to the persons in charge of a gravel train, then the engineers of freight and passenger trains may turn over their engines to inexperienced persons, and the property and lives of the whole community be put in jeopardy. To thus enlarge and magnify the consequences of a ruling may be an ingenious mode of argument, but we do not think it is sound. It does not follow that, because the crew in charge of a gravel train may allow the servants of a consignee to assist in removing earth from the cars, therefore the engineers of freight and passenger trains may turn over their engines to inexperienced hands. We give no countenance to such a doctrine. Our decision goes no further than to hold that the persons having the charge of the freight may allow the servants of the consignee to remove it from the cars, and the latter, while so engaged, have a right to be protected against the negligence of the former; in other words, that in such cases the rule of "respondeat superior" applies. Such a doctrine seems to be well sustained by authority, and we believe it to be sound.

2. We will now consider the motion. It is the opinion of the court that the jury were properly instructed, and that the evidence was sufficient to justify a verdict for the plaintiff; but we think that the damages assessed by the jury (\$8,000) were clearly excessive. When one is negligently injured, and he dies immediately, the largest amount recoverable is \$5,000. The amount may be less, but never more. If the person injured survives for a considerable length of time, this limitation does not apply, or, rather, did not when this action was tried. What the rule may be under the recent statute (Act 1891, chap. 124) will not now be considered. But we think this statutory limitation, whether applicable to the particular case under consideration or not, is entitled to consideration in determining whether or not a verdict is excessive. The damages recoverable for negligently causing the death of a person must in every case depend largely upon what would probably have been the earnings of the deceased if he had not been killed. Other elements enter into the calculation, but the earning capacity of the deceased is always an important factor. The death of one capable of earning a large income is necessarily a greater loss to his estate than the death of one capable

of earning only a small income. The earning capacity of the deceased in this case must have been small. He was not a skilled workman. His only employment had been working in sewers and shoveling gravel. This appears from his own deposition, taken before his death. And notwithstanding he was an unmarried man, and no one dependent upon him for support, and twenty-three of age, he had not saved a dollar of his earnings. We feel justified, therefore, in assuming that his earning capacity was small. Possibly, if he had lived, he might, later in life, have developed a capacity for more lucrative employments. Probably not. And, in estimating the loss to his estate caused by his death, we must be governed by probabilities, not possibilities. Probably, if the deceased had not been injured, and had lived to the common age of men, he would have left but little, if anything, to his surviving relatives. It seems to us that in such a case the damages recoverable for the benefit of surviving relatives ought to be comparatively moderate; that if, under our law, no more than \$5,000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of \$8,000 for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survives his injuries some six or seven months. Influenced by these considerations, we think a new trial must be granted, unless the administrator remits all over \$5,000. If such a remittitur is entered upon the clerk's docket, the entry will be, motion and exceptions overruled.*

Railroad companies— injury to volunteer—who are and who are not volunteers.— Many cases upon these questions are collected in the foregoing opinion and in the opinion in *Church v. Chicago, M. & St. P. R. Co.*, 6 Am. R. R. & Corp. Rep. 547, and in the note to the latter case. In *McDaniel v. Highland Ave. & B. R. Co.*, 90 Ala. 64; 8 South. Rep. 41, the plaintiff, a switchman, while off duty, was riding on the defendant's train and was ordered by the conductor to turn a switch, which he did. It was held that the conductor had no implied authority to give such command, and that the act of obeying it did not constitute the plaintiff an employee of the defendant.

* Reported in 80 Atl. Rep. 116.

NORTHERN PACIFIC R. CO. v. HAMBLY.

(Supreme Court of the United States, May 26, 1894.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. FELLOW-SERVANTS. TRACK REPAIRER AND CONDUCTOR AND ENGINEER OF PASSENGER TRAIN. A common laborer employed by the company owning and operating a railroad, and working, under direction of a section foreman, on a culvert thereon, is a fellow-servant with the engineer and conductor of a passenger train on the road, in such sense as exempts the company from liability for an injury to him due solely to the negligence of such conductor and engineer in operating the train, whereby he was struck by the locomotive.

2. Such employees are engaged "in the same general business," within the Compiled Laws of Dakota territory, section 3753, exempting the employer from liability for losses suffered by his employee in consequence of negligence of another employed in the same general business.

THIS was an action by Hamby to recover damages for personal injuries sustained by him while acting as helper to a crew of masons engaged in building a stone culvert for the defendant company on its right of way, about two miles west of Jamestown, in North Dakota. Upon the trial of the case before a jury, the following facts were proven and admitted to be true by both parties, viz.: "That the plaintiff was a common laborer in the employ of the defendant company, and, at the time he received the injury, which is the ground of this action, he was in the service of the defendant, working under the direction and supervision of a section boss or foreman of the defendant company, assisting in building a culvert on defendant's line of railroad, and that while so engaged the injury complained of, and for which he sues, was inflicted upon him by being struck by a locomotive of a moving passenger train on the defendant's road (said train belonging to the defendant, and being operated by a conductor and engineer in its employ), and that the injury he received by coming in contact with said passenger train, and which is the injury sued for in this cause, was due solely to the misconduct and negligence of the conductor and locomotive engineer on said passenger train, in operating and conducting the movements of said train."

Upon the foregoing facts defendant prayed for an instruction to the jury that the engineer and conductor of the passenger

train were fellow-servants with the plaintiff, and hence that the defendant company was not liable for the injury received by the plaintiff through their negligence. Upon the question of giving such instruction the opinions of the judges were opposed; and the Circuit judge being of opinion that the plaintiff and said conductor and engineer were not fellow-servants, in the sense that would exempt the defendant from liability, so instructed the jury, which returned a verdict for the plaintiff in the sum of \$2,500, upon which judgment was entered. Defendant thereupon moved for a new trial, upon the granting of which the judges were opposed in opinion. The motion was denied, and the judges certified the following questions for the opinion of this court:

“(1) Whether on the admitted facts of this case, hereinbefore set out, the jury should have been instructed that the plaintiff and said conductor and engineer were fellow-servants, and that they should return a verdict for the defendant.

“(2) Whether, on the facts hereinbefore set out, the court should have set aside the verdict and judgment in the case and granted defendant a new trial.

“(3) Whether the plaintiff, who was a common day laborer in the employ of the defendant, which is a railroad company owning and operating a line of railroad, and who was, at the time he received the injury complained of, working for the defendant under the order and direction of a section boss or foreman on a culvert on the line of defendant's road, was a fellow-servant with the engineer and conductor operating and conducting a passenger train on the defendant's road, in such a sense as exempted the defendant from liability for an injury inflicted upon plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train.”

James McNaught, A. H. Garland and H. J. May, for plaintiff in error. *S. L. Glaspell*, for defendant in error.

BROWN, J. (*after stating the facts*). The third question certified to this court, and the only one it is necessary for us to consider, involves the question whether the plaintiff Hamby and the conductor and engineer of the passenger train were, either

by the common law or the statute of Dakota, fellow-servants in such sense as to exempt the defendant railway from liability.

There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow service. The authorities are hopelessly divided upon the general subject, as well as upon the question here involved. It is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation. It may be said, in general, that, as between laborers employed upon a railroad track and the conductor or other employees of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas and Wisconsin hold the relation of fellow-servant to exist (*Farwell v. Railroad Co.*, 4 Metc. [Mass.] 49; *Clifford v. Railroad Co.*, 141 Mass. 564; 6 N. E. Rep. 751; *Brodeur v. Valley Falls Co.*, 16 R. I. 448; 17 Atl. Rep. 54; *Harvey v. Railroad Co.*, 88 N. Y. 481; *Gormley v. Railroad Co.*, 72 Ind. 31; *Collins v. Railroad Co.*, 30 Minn. 31; 14 N. W. Rep. 60; *Railroad Co. v. Watcher*, 60 Md. 395; *Railroad Co. v. Rider*, 62 Tex. 267; *Railroad Co. v. Shackelford*, 42 Ark. 417; *Blake v. Railroad Co.*, 70 Maine, 60; *Ryan v. Railroad Co.*, 23 Penn. St. 384; *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Fowler v. Railway Co.*, 61 Wis. 159; 21 N. W. Rep. 40; *Kirk v. Railroad Co.*, 94 N. C. 625; *Mining Co. v. Kitts*, 42 Mich. 34; 3 N. W. Rep. 240; *Bridge Co. v. Newberry*, 96 Penn. St. 246), while in Illinois, Missouri, Virginia, Ohio and Kentucky the rule is apparently the other way. *Railroad Co. v. Moranda*, 93 Ill. 302; *Sullivan v. Railway Co.*, 97 Mo. 113; 10 S. W. Rep. 852; *Railroad Co. v. Norment*, 84 Va. 167; 4 S. E. Rep. 211; *Dick v. Railroad Co.*, 38 Ohio St. 389; *Railroad Co. v. Cavens' Admr.*, 9 Bush. 559; *Madden v. Railway Co.*, 28 W. Va. 610. The cases in Tennessee seem to be divided. *Railroad Co. v. Rush*, 15 Lea, 145; *Railroad Co. v. Robertson*, 9 Heisk. 276; *Haley v. Railroad Co.*, 7 Baxt. 239; *Railroad Co. v. Jones*, 9 Heisk. 27; *Railroad Co. v. Gurley*, 12 Lea, 46.

In this court the cases involving the question of fellow service have not been numerous, nor, perhaps, altogether harmonious. The question first arose in the case of *Randall v. Railroad Co.*,

109 U. S. 478; 3 Sup. Ct. Rep. 322, in which a brakeman working a switch for his train on one track in a railroad yard was held to be a fellow-servant of an engineer of another train, upon an adjacent track, upon the theory that the two were employed and paid by the same master, and that their duties were such as to bring them to work at the same place at the same time, and their separate services had, as a common object, the moving of trains. It is difficult to see why, if the case under consideration is to be determined as one of general, and not of local, law, it does not fall directly within the ruling of the Randall case. The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of trainmen are concerned, from those of a laborer engaged in keeping the track in repair. Neither of them is under the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the "immediate common object" of securing the safe passage of trains over the road. As a laborer upon a railroad track, either in switching trains, or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. In this view it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them. The case of *Railroad Co. v. Herbert*, 116 U. S. 642; 6 Sup. Ct. Rep. 590, is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks, and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negli-

gence of an officer or agent of the company who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority, both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow-servants. See, also, *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Snyder*, 152 U. S. 684; 14 Sup. Ct. Rep. 756. Even in Massachusetts, whose courts have leaned as far as any in this country in supporting the doctrine of fellow service, it has been held that agents who are charged with the duty of supplying safe machinery are not to be regarded as fellow-servants with those who are engaged in operating it. *Ford v. Railway Co.*, 110 Mass. 240.

Directly in line with the case of *Randall v. Railroad Co.* is that of *Steamship Co. v. Merchant*, 133 U. S. 375; 10 Sup. Ct. Rep. 397, in which the stewardess of a steamship belonging to a corporation brought suit to recover damages for personal injuries sustained by her by reason of a defective railing at a gangway, which gave way as she leaned against it, and precipitated her into the water. The railing had been recently removed, and the gangway opened, to take off some freight, and had not been properly replaced by the porter and carpenter of the ship, whose duty it was to replace them. It was held that, as the porter and carpenter were fellow-servants with the stewardess, the corporation was not liable. Said Mr. Justice BLATCHFORD: "As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow-servant. The contention of the plaintiff is that as the carpenter was in the deck department, and the stewardess in the steward's department, those were different departments, in such a sense that the carpenter was not a fellow-servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow-servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. * * * There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative." The division of the crew into departments was treated as evidently for the convenience of administration upon the vessel, but having no effect upon the question of fellow

service. See, also, *Railroad Co. v. Andrews*, 1 C. C. A. 636; 50 Fed. Rep. 728.

The case of *Railway Co. v. Ross*, 112 U. S. 377; 5 Sup. Ct. Rep. 184, it is claimed to have laid down a different doctrine, and to be wholly inconsistent with the defense set up by the railroad in this case. This action was brought by the engineer of a freight train to recover damages occasioned by the joint negligence of the conductor of his own train and that of a gravel train with which it came in collision. The case was decided not to be one of fellow service, upon the ground that the conductor was "in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants." The court drew a distinction "between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. Under such circumstances he was held not to be a fellow-servant with the fireman, brakeman and engineer; citing certain cases from Kentucky and Ohio, which maintained the same view.

It may be observed that quite a different question was raised in that case from the one involved here, in the fact that the liability of the company was placed upon a ground which has no application to the case under consideration, viz., that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused. That it was not, however, intended, in that case, to lay down as a universal rule that the company is liable where the person injured is subordinate to the person causing the injury, is evident from the latest deliverance of this court, in *Railroad Co. v. Baugh*, 149 U. S. 368; 13 Sup. Ct. Rep. 914, in which the engineer and fireman were held to be, when engaged in their respective duties as such,

fellow-servants of the railroad company, and the fireman precluded, by principles of general law, from recovering damages from the company for injuries caused by the negligence of the engineer.

Neither of these cases, however, is applicable here, since they involved the question of "subordination" of fellow-servants, and not of "different departments." Of both classes of cases, however, the same observation may be made, viz., that to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade or service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions, unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent—as, for example, the superintendent of a factory or railway—and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than if they had been employed by different principals.

We think this case is indistinguishable in principle from Randall's case, which was decided in 1883, and has been accepted as a sound exposition of the law for over ten years, and that, unless we are prepared to overrule that case, the third question certified must be answered in the affirmative. The authorities in favor of the proposition there laid down are simply overwhelming.

We have thus far treated this case as determinable by the general, and not by the local, law, as was held to be proper both in the Ross case and in the case of Baugh. In so holding, however, the court had in view only the law of the respective states as expounded by their highest courts. Wherever the subject is regulated by statute, of course the statute is applied by the federal courts, pursuant to Revised Statutes, section 721, as a "law" of the state.

By section 3753, Comp. Laws Dakota Territory, in one of the courts of which this case was originally commenced, "an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." In the case of *Elliot v. Railway Co.*, 41 N. W. Rep. 758 — a case which arose after the enactment of the above statute — the Supreme Court of the territory held that a section foreman and a train conductor were coemployees, within the purview of this statute, and were "engaged in the same general business." While this construction, given by the Supreme Court of a territory, is not obligatory upon this court, it is certainly entitled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced. The opinion is a very elaborate one, reviews a large number of cases, and follows those of New York, Pennsylvania and Massachusetts, as founded upon sounder principles. We may safely assume that the construction thus given to this statute will not be overruled by the courts of the two states which have succeeded the Supreme Court of the territory, without most cogent reasons for their action.

The third question certified must be answered in the affirmative. FULLER, Ch. J., FIELD and HARLAN, JJ., dissented.*

RAILROAD COMPANIES — ACCIDENTS TO EMPLOYEES — FELLOW-SERVANTS — RECENT DECISIONS.

1. **The question of who are fellow-servants among railroad employees — general principles.**— This question receives careful consideration in the recent case of *Union Pacific R. Co. v. Erickson*, (Neb.) 59 N. W. Rep. 847. The question was presented in the same aspect as in the principal case. The plaintiff was a sectionman, and was injured by a piece of coal, which fell from a passing train. It was the duty of the fireman on the train to place in safety any coal left in a dangerous position by the loading of the tender. It was held that the plaintiff and the fireman were not fellow-servants in such sense as to preclude recovery. The court says: "The next proposition is that Erickson was a fellow-servant of whoever was guilty of negligence, and that the company is, therefore, not liable. Upon this subject elaborate briefs have been filed upon either side, reviewing nearly all the American authorities. We shall not here undertake such a review. We are aware of the hopeless conflict exist-

* Reported in 154 U. S. 849 ; 14 Sup. Ct. Rep. 988.

ing. In fact, a study of the question must convince any one that shortly after the introduction of railways the law entered upon a slow but marked period of transition upon the subject of fellow-servants. No definite result has yet been reached. Probably the leading case both in America and in England applying the doctrine of fellow-servants to all the employees of a common master is that of *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49. All the cases holding that broad doctrine seem to be based directly or indirectly upon the authority or the reasoning of Chief Justice SHAW in that case. It was decided in 1842 before the railway system of the country was developed, before the existence of other large corporations employing vast numbers of men engaged in the pursuit of one general object, but performing different functions, and engaged in many distinct departments. This state of affairs was then just arising, and the vast change of conditions in the relations of master and servant was then only beginning to appear. The extent of that change, and the consequences of applying old rules to new conditions could not then be foreseen. In that case, as in all others upon the subject, the reasons for the rule exempting masters from liability to servants for injuries produced by the negligence of their fellow-servants are stated as two-fold: First, that such injuries must be presumed to be within the contemplation of the parties when they made their contract; and, secondly, that public policy requires the enforcement of such a rule, upon the theory that, by enforcing it, each servant is made closely observant of the acts of his fellow-servants, and that the scrutiny of one another naturally tends to efficiency and care. The first reason given where the rule is sought to be applied without discrimination to all servants of a common master, has already been completely set aside and disregarded, even by those courts in America most inclined to conservatism upon the subject. It is everywhere conceded—First, that inasmuch as a corporation can only act through agents, and all agents are servants, the logical application of the rule would discharge a corporation entirely from liability to its servants; and this gives rise to a corollary that where the negligence is that of a vice-principal, whose acts must be taken as those of the master, the rule does not apply. The recognition of this exception was necessary to preserve another rule, that, while a servant assumes the dangers incident to his employment, he does not assume dangers caused by the negligence of his master. There is as much reason for holding that a servant in entering an employment contracts with a view to possible negligence of the master, as to hold that he contracts with a view to possible negligence of the man who works beside him and upon the same footing. To illustrate by reference to railways, which probably afford as great a variety of grades in employment as any occupation, can it be logically said that a sectionman in the matters within the scope of his employment is less liable to err than a conductor, superintendent or general manager with reference to his own duties? To the writer's mind, when the first distinction was drawn between grades of servants, the force of the general rule, so far as it was based upon contract, was destroyed.

“As to the second reason, that founded upon public policy, there is much force in the observation of Mr. Justice FIELD in *Railway Co. v. Ross*, 112 U. S. 877; 5 Sup. Ct. Rep. 184: ‘It may be doubted whether the exemption has

the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life and limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.' Still, we concede that there may be some force to the rule so far as grounded upon public policy, and confined to servants who are, in the language of the Supreme Court of Illinois, 'consociated by means of their daily duties, or co-operating in the same department of duty and in the same line of employment.' *Railroad Co. v. Moranda*, 98 Ill. 802. Beyond this line we can see no force in it. When the authorities are examined, it is found that they range themselves in two general classes, those following the opinion of Chief Justice SHAW, and those distinguishing between grades of employment and employees in distinct departments of service. The principal objection urged to the latter class is that, by adopting such distinction, the courts overthrow a general rule of easy application, and adopt one not susceptible of precise application, and uncertain in its results. Possibly this objection is well taken. If so, we can only say that it accords with the general spirit of the common law. Perhaps the main distinction between the civil law and the common law is that the civil law is based upon well-defined logical rules, readily susceptible of ascertainment, while the common law is founded upon broader general principles, to be applied to the diversity of human affairs in such a manner as to favor individual liberty and to conform themselves to changed conditions. When the law of fellow-servants was first announced business enterprises were comparatively small and simple. The servants of one master were not numerous; they were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or corporations employing vast numbers of servants, divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions. We are not prepared in this case to propose any set rule for always determining when two employees are fellow-servants within the meaning of the rule, and when they are not, nor are we required for present purposes so to do. Erickson was a sectionman. He was employed, with several others, to keep the roadbed and the track in repair. The fireman was employed to fire the engine, and perform certain duties in connection with the operation of trains. Some one was employed at Grand Island to load the tenders with coal. With either the fireman or this third person Erickson had nothing in common except that he drew his pay from a common source, and that, in a broad sense, they were all carrying out parts of a vast transportation business. Erickson had no control over either of the others, no opportunity of judging of their competency, no supervision of their specific acts, and only by adopting the broadest rule as announced by Chief Justice SHAW could we hold them to be fellow-servants. This rule we are not prepared to adopt. We hold, on the contrary, that employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other, and that to make the rule applicable there must be some

consociation in the same department of duty or line of employment. For the purposes of this case we are content to follow the opinion of Mr. Justice MILLER in *Garrahy v. Railroad Co.*, 25 Fed. Rep. 258, where, in the light of quite recent decisions and of the mature judgment of the Supreme Court of the United States in *Railway Co. v. Ross*, supra, he held that persons occupying such relations were not fellow-servants within the meaning of the rule."

2. Member of train crew and persons employed on or about the track.—A railroad track repairer and a locomotive engineer in the employ of the same company are not fellow-servants, within the rule exempting masters from liability for injuries to a servant sustained through the negligence of a fellow-servant. *Schleveth v. Missouri Pac. R. Co.*, 115 Mo. 87; 21 S. W. Rep. 1110. So of a fireman on a train and a section hand, (Neb.) 59 N. W. Rep. 347. To same effect: *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 237; 38 N. E. Rep. 951.

3. Foreman and laborer under him.—A railroad foreman, having full charge of the loading of cars in a gravel pit, with power to hire and discharge laborers, and to direct their work, is not a fellow-servant of such laborers. *Anderson v. Ogden Union R. & D. Co.*, 8 Utah, 128; 30 Pac. Rep. 805. The foreman of a railroad switching crew is not a fellow-servant with one of the "helpers," who is subject to his orders, and the railroad company is liable for injuries received by the "helper" through the negligence of the foreman. *Armstrong v. Oregon Short Line & U. N. R. Co.*, 8 Utah, 420; 32 Pac. Rep. 693. A foreman is not a fellow-servant of a man under his orders, in respect to his performance of the master's duty of directing the work in his charge. *Schroeder v. Chicago & A. R. Co.*, 108 Mo. 322; 18 S. W. Rep. 1094. Plaintiff was one of a section gang under a foreman. On the way to work, while riding on a handcar, they saw a passenger train approaching on the same track. The gang, under the lead of the foreman, attempted to get the car off, but when the engine was some sixty feet distant the foreman ordered the men "to get out of the way." Plaintiff had not reasonable time to escape, and was struck by the handcar when it was thrown off by the engine. Held, that the questions of negligent direction by the foreman and of contributory negligence of plaintiff were for the jury. *Ibid.*

The mere fact that the servant whose negligence produced the injury complained of is superior in rank to the servant injured, does not alone fix the master's liability. When, however, such servant can fairly be said to take the place of the master, and represent him, so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach. *Colorado Midland R. Co. v. Naylor*, 17 Col. 501; 30 Pac. Rep. 249. B., a general agent, was in charge of track laying, a distinct department of the railroad construction. He had under him five different gangs of men, employed in different branches of the track-laying department, each gang having its particular foreman. B. had authority to hire and discharge both the foremen and the workmen. He controlled the trains, cars, tools and other implements used in track laying. He was subject to the superintending direction of N. when present, but during N.'s absence he had supreme control over his department. The injury complained of by plaintiff was caused by obedience to B.'s direction concerning the manner in

in which certain work should be done. N. was absent at the time. Held, that B. was a vice-principal, and not a fellow-servant. *Ibid.*

4. Conductor of one train and employees on another train.—A railroad company is not liable, under the general law, for the injury of an employee on one train caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close, as the conductor and the injured employee are fellow-servants. *St. Louis, I. M. & S. R. Co. v. Needham*, (C. C. A.) 63 Fed. Rep. 107; *Northern Pac. R. Co. v. Mase*, (C. C. A.) 63 Fed. Rep. 114. Conductors, whether charged with the duty of handling switches or of driving trains, are, so far as actions against the common master for negligence are concerned, not vice-principals, but the fellow-servants of all other employees engaged in the common object of securing the safe passage of trains. *St. Louis, I. M. & S. R. Co. v. Needham*, (C. C. A.) 63 Fed. Rep. 107.

5. Track repairers and switchman working in same yard.—Although a switchman and track repairers work in the same yard, and for the same general purpose of maintaining and operating the railroad of their common employer, if an injury to the switchman is caused by the trackmen negligently leaving a dangerous hole in the track, their negligence is attributable to the employer, in view of his positive duty to provide a reasonably safe place for the switchman's work, the measure of which duty is not changed by having it attended to by others. *Louisville & N. R. Co. v. Ward*, (C. C. A.) 61 Fed. Rep. 927. In *Schaible v. Lake Shore & M. S. R. Co.*, 97 Mich. 818; 56 N. W. Rep. 565, the plaintiff was a track repairer at work in a yard, and was injured by the alleged negligence of the employees of a train in shunting cars. It was held that the trainmen and plaintiff were fellow-servants.

6. Trainmen of construction train and laborers employed and working in connection with such train.—The engineer, fireman, brakemen and shovelers on a gravel train, engaged in loading, hauling and unloading gravel in repair of the roadbed, are fellow-servants engaged in the same common work, and the employer company is not liable to one of such shovelers for personal injury received in consequence of the negligence of the engineer in putting the handling of his engine in the hands of his fireman, who was either careless or unskilled in the management of such machines. *Parish v. Pensacola & A. R. Co.*, 28 Fla. 251; 9 South. Rep. 696. To the same effect on the question of fellow-servant: *Dodge v. Boston & A. R. Co.*, 155 Mass. 448; 29 N. E. Rep. 1086; *Evansville & R. R. Co. v. Henderson*, 184 Ind. 636; 33 N. E. Rep. 1021; *Knahtla v. Oregon Short Line & U. N. R. Co.*, 21 Oreg. 136; 27 Pac. Rep. 91; *Northern Pacific R. Co. v. Smith*, 8 C. C. A. 663; 59 Fed. Rep. 993.

7. Men engaged in making up train and brakemen afterwards engaged in operating the train.—Since the brakemen and the men who make up trains are fellow-servants, a railroad company is not liable for an injury to the former occasioned by the use of too short a pin in coupling cars, when, by the undisputed evidence, a pin of the proper length could have been easily obtained in the yard or from the caboose of the train. *Thyng v. Fitchburg R. Co.*, 156 Mass. 18; 30 N. E. Rep. 169.

8. Train hand and train dispatcher.—One working as fireman on a locomotive, with the permission of the railroad company, for the purpose of learn-

ing the business, is a fellow-servant of a train dispatcher employed by such company, and the company is not liable for an injury to the former by a collision caused by the negligence of the latter in directing the movement of the trains. *Millsaps v. Louisville, etc., R. Co.*, 69 Miss. 423; 18 South. Rep. 696. But such servants are engaged in different departments of labor within the meaning of the Constitution of Mississippi, section 198, giving a remedy to one employed for an injury resulting from the negligence of another employee, when the latter is engaged in a different department of labor. *Illinois Central R. Co. v. Hunter*, 70 Miss. 471; 12 South. Rep. 482.

9. **Conductor and brakeman of same train.**— A railway company, under whose rules the conductor of a freight train has charge and control of the train and of all persons employed on it, and is responsible for its movements, is liable for injuries to a brakeman on such train caused by negligence of the conductor in unexpectedly starting the train. *Railway Co. v. Ross*, 112 U. S. 377; 5 Sup. Ct. Rep. 184; followed, *Railroad Co. v. Baugh*, 149 U. S. 368; 13 Sup. Ct. Rep. 914; distinguished, *Canadian Pac. R. Co. v. Johnston*, 9 O. C. A. 587; 61 Fed. Rep. 738.

10. **Miscellaneous cases.**— The engineer and conductor of a work train are fellow-servants with a laborer thereon, where it is in charge of a roadmaster, who directs its movements, and has control of all persons employed upon it. *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 663; 59 Fed. Rep. 993. A log fell from a log train passing over an unballasted railway, wrecking several cars, and injuring a brakeman, who had assisted in loading the logs. The accident resulted either from the falling out of a stake because it was carelessly put in, or by reason of the jolting of the train, which was running faster than the rules allowed. Held, that in either event the accident was caused or contributed to by the negligence of plaintiff or of his fellow-servants, and he could not recover. *Conger v. Flint & P. M. R. Co.*, 86 Mich. 76; 48 N. W. Rep. 695. A railroad employee, who is one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the negligence of the wreckmaster, who has charge of the wrecking car. *McGrath v. Texas & P. R. Co.*, 9 C. C. A. 133; 60 Fed. Rep. 555. The engineer and fireman of a locomotive and a common laborer, all of whom are engaged in moving cars from a spur track, are fellow-servants, and the latter cannot recover from the master for the former's negligence. *Watts v. Hart*, 7 Wash. 178; 34 Pac. Rep. 423, 771. A member of one "section gang" and the "boss" of another "section gang," employed by the same railroad company, are fellow-servants. *Clarke v. Pennsylvania Co.*, 132 Ind. 199; 31 N. E. Rep. 808. Railroad sectionmen and laborers on repair trains, employed by the same master for the same general purpose of keeping the roadbed and track in order, and working for the same general result, are fellow-servants; and the employer is not liable for injuries to one, caused by negligence of another, even though such other has control over either gang of men. *Thom v. Pittard*, 10 C. C. A. 1056; 62 Fed. Rep. 232. One whose duty it is to take the number and description of each car in trains coming to a certain station and an engineer operating a switch engine at the same station are fellow-servants. *Beuhring's Admr. v. Chesapeake & O. R. Co.*, 37 W. Va. 502; 16 S. E. Rep. 435.

UNION PAC. RY. CO. v. DANIELS.

(Supreme Court of the United States, April 16, 1894.)

1. **RAILROAD COMPANIES. ACCIDENT CASES. PRACTICE.** Where, at the close of plaintiff's evidence, defendant moves to dismiss, which is denied and defendant thereupon proceeds to introduce evidence, any exception to the action of the court is waived.

2. **DUTY OF COMPANY TO EMPLOYEES IN THE MATTER OF FURNISHING SAFE APPLIANCES.** It is the duty of a railroad company to its employees to exercise reasonable care in furnishing suitable cars, machinery and appliances for use in the business in which they are engaged, and in keeping the same in repair, including the duty of making inspections, tests and examinations at the proper intervals.

3. This duty is not discharged by simply using reasonable care to employ and retain only competent and diligent inspectors, but if its inspectors in fact fail to discover a defect which a reasonable examination would have disclosed, and an employee is injured in consequence thereof, it will be liable.

THIS was an action brought by William Daniels against the Union Pacific Railway Company, in the District Court for the third judicial district of the territory of Utah, to recover damages for personal injuries alleged to have been sustained because of defendant's negligence. During the pendency of the writ of error in this court Daniels died and his administrator (William I. Snyder) was substituted.

The complaint alleged that plaintiff was an employee of the defendant company as brakeman on a freight train; that the company by its negligence and carelessness allowed a wheel of one of its freight cars to become defective through a large open crack in it, which rendered the car unsafe; that the crack was an old one, and could have been easily discovered by a proper inspection of the wheels; that it was the duty of the defendant to inspect the wheels of all cars used by it and running on its road, at stations at short intervals along the line of the road; that an inspecting station was established at Green River, Wyo., at which point the defect would have been discovered had the company's inspection service at that point been suitable and sufficient; that the company negligently and wrongfully employed incompetent agents in that service; that they did not employ sufficient in number; that those employed negligently inspected; that the defect by which the accident and ensuing injuries were caused was not discovered by reason of the company's negligence;

and that plaintiff, without fault or negligence on his part, was injured by the breaking of the defective wheel and the train being thereby thrown from the track.

The answer denied the essential averments of the complaint. Plaintiff recovered a verdict, and defendant moved for a new trial, which was overruled, and judgment rendered, from which an appeal was prosecuted to the Supreme Court of Utah territory, where it was affirmed. The opinion is reported in 6 Utah, 357; 23 Pac. Rep. 762. To review that judgment this writ of error was sued out.

The errors assigned and relied on at the bar were: That the court erred in overruling defendant's motion for a nonsuit made at the close of defendant's testimony. That the court erred in giving each of the following instructions:

"(8) In this case, if you find that the plaintiff was injured in consequence of the wreck of the train caused by a crack and break in one of the wheels of the car on a train operated by the plaintiff, if you find that by the proper exercise of proper care and caution in inspecting the wheels the crack was of such a nature that it might have been discovered by the agents or servants of the defendant employed for that purpose, then such neglect to discover the crack was negligence on the part of the defendant, and for which it may be held liable in this action.

"(9) If you find that there was a want of care and diligence on the part of the persons engaged in inspecting the wheels of the cars of defendant, and that the accident was caused thereby, it is not a defense for the defendant to show that it used proper diligence and care alone and only in the selecting of such agents, but the defendant is responsible for the acts of his employees in repairing and inspecting machinery to the same extent as if he were himself present doing the act."

And that the court erred in refusing to give each of the following instructions requested by the defendant.

"Fourth. The plaintiff by his contract of hiring was held to assume the risks of injury from the ordinary dangers of the particular employment and the nature of the business engaged in, and, if you find from the evidence that the accident causing the injury in question was one of the perils incident to the employment, your verdict should be for the defendant.

"Fifth. The presumption of the law in this case is that the defendant exercised proper care and diligence in employing competent and sufficient number of servants to safely carry on its several departments of labor, and in furnishing safe machinery and appliances with which the plaintiff was to do his work, and the burden of proof to show the contrary is on the plaintiff.

"You are further instructed that as between employer and servant, as in this case, negligence on the part of the former is not proven nor to be inferred from the existence of a defect which caused the injury.

"Sixth. Although the inspector of the defendant at Green River station, whose duty it was to inspect the said broken wheel, was guilty of negligence in making the inspection, and that negligence resulted in the wrecking of the train on which the plaintiff was, and the injury of which he complains, still he cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of such inspector or retaining him in his position, and to establish such negligence on the part of the defendant not only the incompetence of such inspector must be shown, but it must also be shown that defendant failed to exercise ordinary care to ascertain his fitness for that service prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant or to some officer or agent of defendant having power to remove him, or after such incompetency would have been ascertained by the exercise of ordinary care on the part of the defendant or such agent or officer.

"Seventh. To render the negligence of the inspector whose duty it was to inspect the said broken wheel the negligence of the defendant, or to render the defendant liable therefor, it is incumbent on the plaintiff to prove that the said inspector was appointed to or retained in his said position with knowledge on the part of the defendant, or some officer or agent of it having the power of appointment and removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable and ordinary care and diligence on the part of the defendant or of such officer or agent."

Artemas H. Holmes and Jno. F. Dillon, for plaintiff in error.
Arthur Brown, for defendant in error.

FULLER, Ch. J. (*after stating the facts*). 1. At the close of the plaintiff's evidence, the defendant moved to dismiss the complaint, which motion was denied, and defendant excepted. Thereupon the defendant proceeded with its case, and adduced evidence on its part. This waived the exception, and the action of the court in overruling the motion to dismiss cannot be assigned for error. *Railroad Co. v. Hawthorne*, 144 U. S. 202; 12 Sup. Ct. Rep. 591; *Brown v. Southern Pac. Co.*, 7 Utah, 288, 291; 26 Pac. Rep. 579.

2. The evidence tended to show that Daniels was a brakeman in the employment of the company, and in the discharge of his duties as such, April 3, 1887, on a freight train made up at Green River, and running thence westward; that he was ordered on top of the train to set the brakes at different points going down a long hill, and was so engaged when the train was suddenly wrecked, and he was severely injured; that a wheel on one of the cars of the train had an old crack in it, some twelve inches long, which rendered it unsafe; that the wheel gave way by reason of the fracture, and thus the disaster occurred; and that, although the crack, being old, was filled with greasy dirt and rust, it could have been detected without difficulty if the wheel had been properly examined at Green River, which was an inspecting station, at which trains were made up.

Upon the inferences properly deducible from such evidence, the rule applied which requires of the master the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests and examinations at the proper intervals. As observed in *Hough v. Railroad Co.*, 100 U. S. 213, 218, the duty of a railroad company "in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees;" and the company "cannot in respect of such matters interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated

the duty he owes as well to the servant as to the corporation." *Hough v. Railroad Co.*, and *Railroad Co. v. Herbert*, 116 U. S. 642; 6 Sup. Ct. Rep. 590, to the same effect, were cited in *Railroad Co. v. Baugh*, 149 U. S. 368, 386; 13 Sup. Ct. Rep. 914, and it was said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and, when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But, within such limits, the master who provides the place, the tools and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other." And see *Fuller v. Jewett*, 80 N. Y. 46; *Rogers v. Manufacturing Co.*, 144 Mass. 198; 11 N. E. Rep. 77; *Spicer v. Iron Co.*, 138 Mass. 426.

There can be no doubt that, under the circumstances of the case at bar, the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition; and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty, or through its negligent performance.

The rulings of the court in giving the eighth and ninth instructions for plaintiff, and in refusing to give the sixth and seventh instructions requested on the part of defendant, were not, therefore, open to the exceptions taken. The sufficiency of the number of inspectors, and their competency, furnished no defense, nor the contrary the ground of recovery, though some of the averments of the complaint may have indicated that cause of action.

The trial court charged the jury, among other things, that the defendant was required to "use a reasonable care, consistent with the nature and extent of the business, and provide proper machinery; but it is not responsible for hidden defects, which could not have been discovered by a careful inspection;" that "the burden of proof is in this case, as in all other cases like it, upon the plaintiff, to make out his case to your satisfaction. The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose; and where there are injuries to its servants or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective. If, by reasonable and ordinary care and prudence, the master may know of the defect in the machinery which he operates, it is his duty to keep advised of its condition, and not needlessly expose his servants to peril or danger;" that "in employing the plaintiff the corporation defendant did not become an insurer of his life or his safety. The servant takes the ordinary risks of his employment. The duty of the defendant towards him was the exercise of reasonable care in furnishing and keeping its machinery and appliances, about which he is required to perform his work, in a reasonably safe condition. It was the defendant's duty, also, to use like ordinary care in selecting competent fellow-servants, and in a sufficient number, to insure that the work would be safely done; and this duty was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men, engaged in the same kind of business, ordinarily exercise."

And that, "as between employer and employee, between master and servant, as in this case, negligence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of."

The defendant had no reason to complain because the fourth and fifth instructions, which it asked, were not otherwise given than as contained in the views thus expressed by the court.

Judgment affirmed.

Mr. Justice JACKSON did not hear the argument, and took no part in the decision in this case.*

Practice in regard to withdrawing cases from the jury and directing a verdict in negligence cases.—A verdict should not be directed by the court, unless, as a matter of law, no recovery can be had under any proper view of the facts which the evidence tends to establish. *Texas & Pac. R. Co. v. Cox*, 145 U. S. 598; 12 Sup. Ct. Rep. 905. It is the settled rule in Nebraska that where different minds may draw different inferences from the same state of facts, as to whether such facts establish negligence, it is a proper question for the jury, and not for the court; but that rule is subject to the qualification that the inference of negligence must be a reasonable one; where it is impossible to infer negligence from the established facts without reasoning irrationally, and contrary to common sense, and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642; 54 N. W. Rep. 976. A court may withdraw a case involving questions of negligence from the jury, and direct a verdict, when the evidence is undisputed, or is of such a conclusive character that the court would, in the exercise of a sound discretion, be compelled to set aside a verdict returned in opposition to it. *Tucker v. Baltimore & O. R. Co.*, 8 C. C. A. 416; 59 Fed. Rep. 968. The rule that undisputed facts present a question of law rather than of fact applies in negligence cases only when the facts are undisputed, and the conclusion to be drawn from the facts is so far indisputable that men could not reasonably differ in their interpretation of them. *Lasky v. Canadian Pac. R. Co.*, 88 Maine, 461; 22 Atl. Rep. 367. An instruction that the plaintiff is not entitled to recover should not be given, unless, admitting all that the evidence tends to prove, it is insufficient in law to maintain the action. *Pennsylvania Co. v. Backes*, 133 Ill. 255; 24 N. E. Rep. 563. Though generally the question of negligence is for the jury, yet where there is no controversy about the facts, and it clearly appears that deceased was guilty of contributory negligence, the question is for the court, and a verdict for plaintiff will be set aside and a new trial granted. *Chaffee v. Old Colony R. Co.*, 17 R. I. 658; 25 Atl. Rep. 141. While questions of negligence and contributory negligence are ordinarily

* Reported in 152 U. S. 684; 14 Sup. Ct. Rep. 756.

questions of fact for the jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition thereto, it may withdraw the case from the jury and direct a verdict. *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S. 245; 14 Sup. Ct. Rep. 85. To the same effect as the foregoing are the following cases: *Glass v. Memphis & C. R. Co.*, 94 Ala. 581; 10 South. Rep. 215; *Dewald v. Kansas City, etc., R. Co.*, 44 Kans. 586; 24 Pac. Rep. 1101; *Bradley v. Ft. Wayne & E. R. Co.*, 94 Mich. 35; 53 N. W. Rep. 915; *Steffenson v. Chicago, M. & St. P. R. Co.*, 48 Minn. 285; 51 N. W. Rep. 610; *Carroll v. Interstate Rapid Transit Co.*, 107 Mo. 653; 17 S. W. Rep. 889; *Buck v. People's St. Ry., etc., Co.*, 108 Mo. 179; 18 S. W. Rep. 1090; *Hyde v. Missouri Pac. R. Co.*, 110 Mo. 272; 19 S. W. Rep. 483; *Chicago, B. & Q. R. Co. v. Bernard*, 82 Neb. 306; 49 N. W. Rep. 362; *Texas & N. O. R. Co. v. Crowder*, 76 Tex. 499; 18 S. W. Rep. 381; *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. Rep. 87; *Union Pacific R. Co. v. James*, 6 C. C. A. 217; 56 Fed. Rep. 1001; *Missouri Pac. R. Co. v. Moseley*, 6 C. C. A. 641; 57 Fed. Rep. 921; *Northern Pac. R. Co. v. Teeter*, (C. C. A.) 63 Fed. Rep. 527.

In Indiana, when there is any conflict of evidence, however slight, the issue must be left to the jury. *Pennsylvania Co. v. McCormack*, 131 Ind. 250; 30 N. E. Rep. 27. So in West Virginia it is held that a motion by the defendant to exclude the plaintiff's evidence, upon the ground that it is not sufficient to warrant a verdict in his favor, will not be granted, if there be any evidence which tends in any degree, however slight, to prove the plaintiff's case. If it tend to prove the plaintiff's case in any degree whatever the case cannot be withdrawn from the jury. The motion can never prevail or be sustained merely because the court may think the weight of evidence is against the plaintiff. *Carrico v. W. Va. Cent. & P. R. Co.*, 35 W. Va. 381; 14 S. E. Rep. 12. See, also, *Gunn v. Ohio River R. Co.*, 36 W. Va. 165; 14 S. E. Rep. 465.

An exception to the court's refusal, at the close of the plaintiff's evidence, to direct a verdict for defendant, is waived by proceeding with the trial, and will not be considered on appeal. *Latremouille v. Bennington & R. R. Co.*, 68 Vt. 336; 22 Atl. Rep. 656. To same effect: *Joliet, A. & N. R. Co. v. Velie*, 140 Ill. 59; 26 N. E. Rep. 1086; 29 N. E. Rep. 706.

After the defendant has given in his own evidence, a motion to strike out all the evidence, on the ground that it is insufficient to sustain the issue on the part of the plaintiff, should not be granted. *Carrico v. W. Va. Cent. & P. R. Co.*, 35 W. Va. 389; 14 S. E. Rep. 12; *Overby v. Chesapeake & O. R. Co.*, 37 W. Va. 524; 16 S. E. Rep. 813.

If a party desires to submit his case to the jury on the evidence of the plaintiff, and asks an instruction that the jury find for the defendant, he should make his motion to that effect, without reservation. If he does not, the court may refuse to entertain it. *Union Pac. R. Co. v. Mertes*, 85 Neb. 204; 52 N. W. Rep. 1099.

The federal courts have no power to order a compulsory nonsuit at the close of plaintiff's evidence, or to direct a verdict for defendant before the latter has rested his case. *Northern Pac. R. Co. v. Charless*, 2 C. C. A. 380; 51 Fed. Rep. 562.

DICKSON V. OMAHA & ST. L. RY. CO.

(Supreme Court of Missouri, Division No. 1, July 9, 1894.)

1. RAILROAD COMPANIES. LIABILITY FOR INJURY TO ENGINEER BY COLLISION WITH ANIMALS STRAYING THROUGH DEFECTIVE FENCE. A statute requiring railroad companies to fence their tracks, though in terms only imposing as a penalty a double liability for injuries to live stock, caused by not doing so, renders a railroad company liable for the death of an engineer, caused by a collision of his engine with a bull that had come on the track through a defect in the fence.

2. QUESTION OF PROXIMATE CAUSE IN SUCH CASE. In such case the defective fence is the proximate cause of the injury, though the train was going at a greater rate of speed than that allowed by the rules of the company.

3. CONTRIBUTORY NEGLIGENCE. REMAINING ON ENGINE WHILE FRONT WHEELS OFF. It appeared that the effect of the collision was to throw off the front wheels of the engine only; and that it ran in this condition for about 1,000 feet, when, coming to a switch, it was overturned and the engineer killed. It was held under the evidence that the engineer was not guilty of contributory negligence in remaining on the engine.

4. INSTRUCTIONS. Where there is no evidence that either deceased or defendant knew of the defect in the fence, an instruction that, if the defect was known to deceased as well as to defendant company, there could be no recovery, unless deceased notified defendant, and was induced to remain by its promise to repair the fence, was properly refused, as implying that deceased was under the same obligation as defendant to know that the defect existed.

THIS action is brought by Lena Dickson, widow of James Dickson, deceased, against the Omaha and St. Louis Railway Company, to recover the sum of \$5,000 for alleged negligence of the railway resulting in the death of Dickson, near Evona, Mo., on May 16, 1891. The petition avers that on that day deceased was in the employ of defendant as locomotive engineer, and was operating one of its locomotives attached to a freight train. While so operating said engine a collision occurred with a bull which had strayed upon the track through a defective fence, by reason of which collision the engine was thrown from the track and overturned, thereby killing Dickson; that the bull got upon the track, and the accident occurred, at a point where the law required the defendant to erect and maintain the fence; that defendant was negligent, in that, although it was required by law to maintain said fence, it failed to do so, and, by reason of said negligence, plaintiff's husband was killed, and she prayed damages as above. To the petition the defendant entered a general denial,

which it supplemented with the allegations that, if the fence was defective, Dickson knew of such defect; that, at the time of the accident, Dickson was violating the rules of the company, in running his engine at a high, forbidden and dangerous speed; that the injury was not due to the collision with the bull, but was caused by striking a three-throw switch at great distance from the point where the collision occurred; and that, after the collision with the bull, Dickson might have avoided all injury by the exercise of ordinary care. The testimony offered tended to show that on the morning of May 16, 1891, Dickson, then operating one of defendant's trains as engineer, was approaching the station at Evona, going east. When the engine was about 950 feet west of the west switch, and moving at from fifteen to twenty miles an hour, it collided with a bull which had strayed upon the track through a defect in the railroad fence along the right of way. The bull was carried on the cowcatcher about 100 feet, and then rolled on the track in front of the engine. The only effect of the collision was to derail the front pair of small wheels under the engine. These kept on the ties close to the rails. All the rest of the train kept the track for 850 feet, and until the west switch was reached. After colliding with the animal, Dickson reversed his engine, and applied an air brake with which the engine was fitted. He then climbed through the window of his cab out onto the running board of the engine, and after walking its length, stepped down upon the steam chest, and there stood until the west switch was reached. The engine, when it reached this switch, was running about twelve miles an hour. Upon striking the switch, with its front small wheels derailed, the engine was thrown over; and Dickson, who was then standing upon the steam chest, was also thrown to the ground, and crushed to death by some part of the engine or tender. The fireman jumped off within sixty or seventy feet from the place where the bull was struck. When last seen, Dickson was leaning over, watching the derailed wheel under him, which was moving over the ties. After the application of the air brake on the engine, the train began to slow up until its speed at the switch was reduced to about twelve miles an hour. One of the rules of defendant was as follows: "Freight trains must be under control when approaching and passing

through all stations, and be prepared to stop in case the track is obstructed." At the conclusion of the testimony, defendant unsuccessfully demurred to the evidence. Any other necessary facts will sufficiently appear in the opinion. The case was submitted to the jury upon instructions given by the court which need not be set out here. Some instructions asked by defendant were refused. They will be sufficiently noticed in the opinion. The judgment was for plaintiff, for \$5,000, and defendant appealed.

Theo. Sheldon and E. E. Alshire, for appellant. A. H. Waller, for respondent.

MACFARLANE, J. (*after stating the facts*). 1. The only negligence charged, as ground for recovery, is the failure on the part of defendant to observe the statutory requirement to so keep its fence in repair as to prevent cattle from straying on its railroad. Defendant insists that the statute requiring railroad companies to make and maintain fences on the sides of their roads is designed solely to prevent injuries to the domestic animals of adjacent landowners, and does not create a duty from defendant to its employees. The duty of a master to his servant requires the exercise of reasonable care, not only to provide safe, adequate and suitable machinery and appliances for his use, but also such care to keep the premises upon which he is required to work in a condition reasonably safe and secure for the performance of the duties required of him. The degree of care must depend largely upon the character of duties required of the servant, the peril to which he is exposed from failure to observe it, and the opportunity he has for avoiding the dangers. There are but few, if any, duties a servant is called upon to perform which are attended with more hazards than those attending the running and management of locomotives and trains upon railroads, and the care the law requires of the master, in respect to providing reasonably adequate and safe engines and cars, is no greater than that required in furnishing a reasonably safe track, and keeping it free from obstructions. The dangers from defects are as great in one as the other, and the care should be commensurate with the dangers. *Henry v. Railway Co.*, 109 Mo. 493; 19 S. W. Rep. 239, and cases cited. We are taught by

common experience that cattle and other animals, unless restrained, will stray upon the tracks of railroads, and cause serious and dangerous obstructions to the operation of trains thereon ; thereby imperiling the lives, not only of persons carried, but, to a greater degree, of each employee engaged in the duty of managing them. We can see no reason why, at common law, the railroad company would not as well be required to use reasonable care to prevent such obstructions as to see that the ties and rails are sound, and the roadbed secure. I can conceive of no more adequate method that could be adopted by a railroad corporation for keeping domestic animals off the track of its road than that of inclosing it by fences. So it has been held that if the want of a proper fence makes a railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent landowner. *Buxton v. Railway Co.*, L. R., 3 Q. B. 549. It is true that the statute requiring railroad corporations to fence their tracks only, in express terms, gives to the owners of cattle or other animals killed or injured in consequence of a neglect to perform this duty a right of action, yet it has been held in this state that the law was designed likewise for the protection and safety of the traveling public. *Briggs v. Railway Co.*, 111 Mo. 173 ; 20 S. W. Rep. 32, and cases cited. The United States Supreme Court, in discussing the Missouri Fencing Law, and its constitutionality under the police power, uses this emphatic language : "In few instances could the power be more wisely or beneficially exercised than in compelling railroad corporations to inclose their roads with fences, having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident, in thickly-settled portions of the country, absolutely essential. The omission to erect and maintain such fences and cattle guards, in the face of the law, would justly be deemed gross negligence." *Railway Co. v. Humes*, 115 U. S. 522 ; 6 Sup. Ct. Rep. 110. Thus, while the statute only imposes upon the corporation, as a penalty for the nonobservance of the law, double damages for animals killed or injured, the duty to fence is made obligatory. The duty is absolute and unqualified, and is reasonably supposed to have been intended for the protection of all persons upon railroad trains, who are exposed to danger by such

obstructions, whether they be passengers or employees. The right of a passenger to recover for personal injuries incurred on account of such negligence has been declared (*Blair v. Railroad Co.*, 20 Wis. 254; *Fordyce v. Jackson*, 56 Ark. 597; 20 S. W. Rep. 528, 597; *Railway Co. v. Wilson*, 79 Tex. 371; 15 S. W. Rep. 280), and, also, of a parent to recover for the death of an infant child who wandered upon a railroad track by reason of a defective fence, and was struck by a train. *Keyser v. Railway Co.*, 56 Mich. 559; 23 N. W. Rep. 311; *Struettgen v. Railway Co.*, 80 Wis. 498; 50 N. W. Rep. 407; *Isabel v. Railway Co.*, 60 Mo. 484; *Singleton v. Railroad Co.*, 7 C. B. (N. S.) 287; *Railroad Co. v. Grablin*, 38 Neb. 90; 56 N. W. Rep. 797. We are of the opinion that a right of action also accrues to an employee, engaged upon a railroad train, for injuries received, without his own fault, by reason of the negligence of the corporation in failing to comply with the fencing statute. It has so been held, under a similar statute, by the New York Court of Appeals. *Donnegan v. Erhardt*, 119 N. Y. 472; 23 N. E. Rep. 1051.

2. It is said, in the next place, that the defective fence was not the direct and proximate cause of the accident. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces the event, and without which that event would not have occurred. Proximity in point of time or space, however, is not part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation." *Shear. & R. Neg.* § 26. Under this definition, there can be no doubt that the negligence in failing to keep the fence in repair was the immediate cause of the obstruction of the track, which, in a natural and continuous sequence, produced the derailment of the engine, and consequent injury. Without the defective fence, the derailment and injury would not have occurred. The negligence was clearly the direct cause of the injury.

3. It is further insisted that the negligence of deceased, in disobeying the plain and positive rule of defendant, which required that "freight trains must be under control when approaching and passing through all stations, and be prepared to stop in case the track is obstructed," was also a proximate cause of the injury, which directly contributed thereto, and which prevents a recov-

ery. It may be admitted that deceased was acting in violation of the rules of defendant at the time the engine collided with the bull, and was in consequence negligent; but we are unable to see any proximate and natural connection, as a cause, between this negligence and the derailment of the engine, and injury and death of plaintiff's husband. Mere negligence, without a resulting damage, can no more be pleaded as contributory negligence to defeat an action than it can be charged as an original cause of action. The connection, as a producing cause, must be made to appear in either case. "It must appear, in order to defeat the right of action, that but for plaintiff's negligence, operating as an efficient cause of the injury, in connection with the fault of defendant, the injury would not have happened. Beach Contrib. Neg. § 34. It appears impliedly from the rule itself, and directly from the testimony of the superintendent and train dispatcher of defendant, that the purpose of the rule was to avoid collisions, obstructions and misplaced switches at stations. It appears further that the collision which resulted in the derailment of the train occurred nearly 1,000 feet from the first switch of the station yards. It does not appear that the engine could, by the most diligent care, have been held under such control as would have prevented the collision after the danger appeared. But it is said that the derailment did not occur immediately from the collision, but that the wheels ran safely on the ties until the switch was reached—the distance of nearly 1,000 feet—and the engine was then thrown from the track by reason of coming into the switch in a derailed condition. We do not see how this circumstance changes or shifts the proximate cause of the accident from that of the collision with the bull to that of the violation of the rule in question, or how the disregard of the rule became a direct and contributing cause of the injury. There was no intervening cause between the collision and the final disaster, except the contact with the switches, which there is no pretense that deceased could have avoided. We can speculate and theorize as we may as to what course of conduct might have avoided the disaster, but the fact remains that the direct cause was the obstruction of the track, which was brought about by the negligence of defendant, and the consequences of which could not have been avoided by any degree of care deceased could have

exercised. What might have been the result, had the rule been observed, is mere speculation.

4. Again, it is argued that deceased was negligent in remaining on the engine while running 1,000 feet with two wheels off the rails. This contention is untenable, for two reasons: First, because it does not appear from the evidence that the course adopted by the deceased was not the safest and most prudent, in the circumstances; and, second, when suddenly exposed to great and imminent danger, he was not expected to act with that degree of prudence and wisdom which would otherwise have been required of him. The evidence shows that deceased, as soon as he had reversed his engine, sounded the alarm, and put on the air brakes; got out of the cab onto the running board and steam chest, where he remained until the engine was overturned. According to the evidence, he thus assumed the safest position he could have taken. The evidence further shows that when an engine is running rapidly, with two of its wheels off the rails, and jumping from tie to tie, it pitches and jars to such a degree that it is exceedingly difficult and dangerous to jump therefrom. One witness, an engineer, in testifying as to his own experience in riding an engine under similar circumstances, stated: "It was impossible to jump. The jar of the engine riding the ties was such that a man had no control of himself. If he jumped he would fall under. He would have no use of his limbs at all. I could not gather for a spring." With this evidence, we could not say that deceased was negligent in remaining on the engine. Nor can we say, in the circumstances, that he would have been chargeable with negligence, though he did not adopt the safest and best course to avoid injury. *Adams v. Railroad Co.*, 74 Mo. 554; *Siegrist v. Arnot*, 86 Mo. 208.

This disposes of the questions raised on the demurrer to the evidence, as well as to complaints made to the rulings of the court in giving and refusing certain instructions.

5. Complaint is made of the refusal of the court to give the following instruction requested by defendant: "The jury are instructed that if the defect or bad condition of the fence, whereby the bull came upon the track, was known to Dickson as well as to the company, there can be no recovery in this case,

unless the evidence shows and the jury believe that Dickson notified the company of such defect, in the fence, and was induced to remain in the company's employment by its promise that the fences should be repaired." The instruction evidently intended to inform the jury as to the risks deceased assumed in case he knew of the defective fence, and continued to run trains over the road without objection. But we think the instruction, as asked, was misleading, and did not properly declare the law, in that it required the jury to find as a fact that the defect in the fence was known to deceased "as well as to the company." The language is susceptible of the interpretation that deceased was under the same obligation to inspect and ascertain existing defects as was required of the corporation. There was no positive proof that either Dickson or defendant had actual knowledge of the defects. It was the duty of the defendant to use reasonable care, by proper inspection, to ascertain whether defects existed. This duty, from the situation of the fence with respect to the track, and from the nature of the employment and duty of an engineer, could not justly have been required of deceased. A proper and careful discharge of his duty required constant watchfulness of the machinery he was operating and of the track before him, and the rapidity of his movement made it impossible to examine into the condition of fencing fifty feet away, though he had time and opportunity to do it. We think deceased could not have been chargeable with notice of the defect unless it had been shown that such defects were so common and apparent that they could not have escaped his observation while properly attending to his business. It could not be said of him, as of the master, that he would be chargeable with knowledge if he could have known by the exercise of due care. Before he can be charged with having assumed risks of injury from defects in fences it was necessary to have shown that he had knowledge of them, but knowledge may have been inferred by the jury from the nature of the defects and the opportunity for observation. The instruction as asked was improper; and the court was not required, as in criminal cases, to correct it or give a proper one on the question intended to be covered. No error being shown the judgment is affirmed. All concur.*

* Reported in 27 S. W. Rep. 476.

1. **Whether statutory duty to fence track inures to benefit of passengers and employees on train or to children and others injured in consequence of a neglect of the duty.**—The decision of the principal case is in accordance with *Donegan v. Erhardt*, 119 N. Y. 468; 2 Am. R. R. & Corp. Rep. 228. *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. Rep. 370, is a case arising under the Missouri statute, and in which the same conclusion was reached as in the principal case by the United States Circuit Court of Appeals. It was there held that where, through the failure of a railroad company to erect and maintain sufficient fences, as required by the Revised Statutes of Missouri, 1889, section 2611, an animal gets on the track, causing the derailment of a train, an employee on the train, who is injured by the accident, is entitled to sue the company therefor, since such statutes are designed to protect the persons on trains as well as the cattle owners. The court says: "The contention of the company is that the fence statute referred to was enacted for the benefit of the proprietors of adjoining lands, and that the plaintiff, as an employee of the railroad company, takes nothing by reason of the failure of the company to comply with its terms. It is doubtless true that when a right is given by statute only those to whom the right is in terms given can avail themselves of its benefit, but it does not follow that when a duty is so imposed a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class it was also intended for the protection of all who need such protection. In this case a technical argument might be made from the mere language of the section. It provides that the corporation shall be liable in double the amount of all damages, not only for those 'done by its agents, engines or cars to horses, cattle,' etc., but also for those done 'by reason of any horses, cattle,' etc., 'escaping' from such contiguous fields. As the presence of the steer on the track was the cause of the derailing of the train, and as that steer escaped from the adjoining field through the defective fence, it may plausibly be argued that the recovery in this case comes within the express language of the statute as being for damages done by reason of the escape of the steer from the adjoining field through the defective fence. But we do not care to rest our conclusions upon this technical construction. The purpose of fence laws of this character is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains, and those who are traveling thereon, is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train, has a right to complain of the com-

pany, if it fails to comply with this statutory duty." To the same effect are, *Louisville, N. A. & C. R. Co. v. Hendricks*, 128 Ind. 462; 28 N. E. Rep. 58, and *Quackenbush v. Railroad Co.*, 62 Wis. 411; 22 N. W. Rep. 519; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371; 15 South. Rep. 208. The law of Texas, however, is left somewhat in doubt by the following case: An engineer was injured in a wreck caused by a collision with two cows. An inclosure had been fenced on each side, but no cattle guards had been put in, of which the engineer had no knowledge until he entered the inclosure. Revised Statutes of Texas, 1879, articles 4240, 4242, require railroad companies to place cattle guards, when its track enters any field or inclosure, which shall be so constructed as to protect such field or inclosure from the depredations of cattle. Article 4244 provides that, should any company neglect to put in proper cattle guards, is shall be liable to the party injured for all damages that may result. It was held that the statute was designed solely to protect the inclosures, and the failure to put in cattle guards was not evidence of negligence. *Ward v. Bonner*, 80 Tex. 168; 15 S. W. Rep. 805.

That such statutes inure to the benefit of children straying upon the track, is held in *Stuettgen v. Wisconsin Central R. Co.*, 80 Wis. 498; 50 N. W. Rep. 407, and *Hayes v. Illinois Central R. Co.*, 111 U. S. 228; 4 Sup. Ct. Rep. 369. And see *McCarthy v. Fitchburg R. Co.*, 154 Mass. 17; 27 N. E. Rep. 778. See, also, notes to *Donegan v. Erhardt*, 2 Am. R. R. & Corp. Rep. 228, 231.

2. When it is duty of railroad company to fence track, though not required by statute.—When fences are reasonably necessary to protect the track from the intrusion of animals, the duty of the company to its passengers and employees requires it to construct and maintain such fences. *Fordyce v. Jackson*, 56 Ark. 594; 20 S. W. Rep. 528. See, also, 2 Am. R. R. & Corp. Rep. 281.

ROGERS v. KENNEBEC STEAMBOAT CO.

(Supreme Judicial Court of Maine, February 24, 1894.)

1. CARRIERS. EFFECT OF ACCEPTING FREE PASS WITHOUT READING CONDITIONS. One who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition, whether he reads it or not.

2. VALIDITY OF CONDITION ON FREE PASS EXEMPTING CARRIER FROM LIABILITY FOR INJURY. Such a contract, exempting a carrier from liability, is not prohibited by any rule of public policy in this state, and is effectual to exonerate the carrier from liability for the negligence of his servants.

3. INCEPTION OF RELATION OF PASSENGER AND CARRIER. A person may become a passenger before the transportation has actually commenced.

THIS was an action on the case by Marcia E. Rogers against the Kennebec Steamboat Company to recover damages for

personal injuries alleged to have been received by the plaintiff, through the negligence of the defendant's servants, while attempting to pass over the gangplank or bridge from the defendant's wharf in Bath to their steamboat, on the 20th day of November, 1890. Judgment for plaintiff. Defendant excepts.

The plaintiff admitted that she was invited by a friend, who had a pass for four ladies, to go from Bath to Boston by boat, but testified that she never saw the pass, and denied that at the time of the injury she was traveling on a pass, or had any knowledge or notice of the conditions it contained.

A material part of the declaration is as follows :

“ And the plaintiff avers further that on the day last mentioned, in company with and by invitation of a friend, she came and was lawfully upon said wharf, with intention to go thence to Boston on the last-mentioned steamboat, and that when said bridge or slip was fixed by the defendant for use, and was open for such use by the defendant, and divers persons then standing on the wharf, including the plaintiff and the friend aforesaid, were by the defendant invited to pass upon, across and over said bridge to the steamboat aforesaid, then and on the day last named the plaintiff did enter and go upon said bridge or slip, as so invited by the defendant, to get access to the steamboat aforesaid, believing that the same bridge was safe and fit for use, and not knowing the contrary. And further, the plaintiff alleges that when she entered upon said bridge as aforesaid, she understood that the friend aforesaid had in possession a pass or license issued by the defendant through some authorized agent, but never seen by the plaintiff, whereby the plaintiff was entitled to go upon said steamboat from Bath to Boston without the payment of any fare, and that the plaintiff then and there intended to seasonably ascertain whether such pass or license was in possession of the friend, and, in default of such pass, to pay to the defendant at the office aforesaid, or elsewhere as the defendant might prefer, the regular, usual, legal price and fare charged by the defendant for transportation of one person from Bath to Boston, and had in her possession lawful and sufficient money to make the payment aforesaid.”

Weston Thompson, for plaintiff. *A. C. Stilphen and Symonds, Snow & Cook*, for defendant.

WHITEHOUSE, J. On the evening of November 20, 1890, the defendant's steamer Kennebec arrived at the wharf in Bath about half-past five o'clock, on her regular passage from Gardiner to Boston. There was a fresh breeze from the northwest, with a flood tide and freezing temperature, and the spray from the wheels caused ice to form on the guards of the steamer. The gangplank was adjusted so as to form a bridge or passageway between the steamer and the wharf. The plaintiff had come down from Brunswick by rail, and was going on board as a passenger to Boston. She was on the gangplank, and with a single step more would have been on the steamer, when suddenly, by reason of the swaying of the boat, the end of the gangplank resting on the steamer slipped from its place and dropped down over the margin of the guard. The lip of the plank was thereby thrown upward and backward, the edge of it striking the plaintiff's leg, and inflicting the injury of which she complains.

The plaintiff claims that the defendant's servants were guilty of negligence in the management of the gangplank, and in this action to recover damages for the injury thereby sustained a verdict of \$3,950 was rendered in her favor.

The case now comes to this court on exceptions and motion for a new trial. The defendant claims, first, that the evidence fails to show any negligence on the part of the defendant's servants on the occasion in question, and, secondly, that the plaintiff became a passenger by virtue of a free pass which had printed on the back of it an express condition that the person accepting it must assume all risk of personal injury while using it.

The plaintiff admits that she was invited by Miss Niles to go to Boston by boat on a pass in company with Miss Niles and her two sisters, Miss Fannie Niles and Mrs. Remick, but says she never saw any pass, and denies that at the time of the accident she was traveling on a pass. She further says that, in any event, she had no knowledge of any condition on the pass in question which exempted the defendant from liability for personal injuries, and was not chargeable with any knowledge of such condition which Miss Niles and her sisters may have had. It is further contended that the terms printed on the back of the pass ought not to be construed as a contract against the defendant's liability for negligence, and finally it is insisted that it was not competent for the

defendant, as a common carrier of passengers, to make such a stipulation against liability for negligence.

1. The plaintiff had undoubtedly consented to avail herself of the benefit of a free pass on the defendant's steamer to Boston. Her own testimony is clear and unequivocal on this point. She was informed by Miss Niles that a pass had been obtained "for four ladies," and accepted her invitation to go in place of one first invited, who was obliged to decline. She admits that it was "distinctly understood" that she was to go on the pass, and that "no doubt was expressed by any one" as to her "being allowed to go on it." She "had always wished to go by boat," and accepted with pleasure this proffered courtesy from her friend. She afterwards stated that her employer would not have consented for her to leave at that busy season but for the favorable opportunity presented to her of going on a pass. She went from Brunswick to the wharf at Bath, and stepped upon the gang-plank of the steamer, with the full expectation of a gratuitous passage to Boston, and with no intention of paying her fare. That such a pass was actually issued by the defendant, and was in the possession of Miss Niles, on the steamer, as well as at Brunswick, is conclusively shown by the uncontradicted testimony of Miss Niles and Mrs. Remick. It was presented by the latter at the ticket office on the steamer for the purpose of obtaining a stateroom. After obtaining the key the ladies went up stairs to the stateroom assigned them, and the plaintiff there ascertained the extent of her injury. The pass was returned to Mrs. Remick when she received the key, but, in the excitement and confusion following the accident, it appears to have been lost. Its terms are satisfactorily shown, however, by the testimony of the Niles sisters, in connection with a copy of the pass, in blank, introduced in evidence.

It is equally clear that the plaintiff had become a passenger at the time of the accident. She was at that moment within the protection of the defendant's servants, and immediately after the injury was assisted by them to the ladies' cabin. The steamer then left the wharf, and proceeded on her course down the river. It was soon discovered, however, that the plaintiff's wound required the attention of a surgeon, and the steamer put back to the wharf, and the plaintiff returned to Brunswick that night.

It cannot be questioned that a person may become a passenger before the transportation has actually commenced, and before he has entered the carrier's vehicle. In the familiar case of *Brien v. Bennett*, 8 Car. & P. 724, the defendant's omnibus was passing on its journey, and the plaintiff made a signal for the driver to stop and take him up. The omnibus was accordingly stopped for that purpose, and the door opened; but just as the plaintiff was putting his foot on the step the omnibus was driven along, and the plaintiff thrown upon his face and injured. It was held that the stopping of the omnibus at the plaintiff's request implied a consent to take him as a passenger, and that thereupon, in attempting to enter the carriage, he had the rights of a passenger.

In *Shannon v. Railroad Co.*, 78 Maine, 52; 2 Atl. Rep. 678, a person waiting in the station for a passage on a train soon to depart was invited by the ticket agent to sit in an empty car standing on the side track while the waiting room was being cleaned; and it was held that she was entitled to the same protection from the company, while in this car, as if in the regular waiting room. In either place the person is a passenger in the care of the company. See, also, *Smith v. Railway Co.*, 32 Minn. 1; 18 N. W. Rep. 827; *Warren v. Railroad Co.*, 8 Allen, 227; *Poucher v. Railroad Co.*, 49 N. Y. 263; *Railroad Co. v. Martin*, 111 Ill. 219; *Allender v. Railroad Co.*, 37 Iowa, 264; *Caswell v. Railroad Co.*, 98 Mass. 194; *Hutch Carr.* (2d ed.) §§ 556-565.

Upon the facts disclosed in the case at bar, it must be conceded that at the time of the accident the relation of passenger and carrier between the plaintiff and the defendant had been fully established. She clearly would have been a passenger if she had gone upon the gangplank intending to procure a ticket at the office, and pay her fare, and she was not the less so because traveling on a pass. *Hutch. Carr.* § 565; *Shannon v. Railroad Co.*, *supra*.

2. The plaintiff was traveling on a pass with the following conditions printed on the back of it, viz.: "The person who accepts this pass thereby assumes all risks of personal injury, and loss or damage of property, while using it." The terms of this condition are clear and unmistakable. They are in effect the same as those on the "free ticket" in *Quimby v. Railroad Co.*, 150 Mass. 366; 23 N. E. Rep. 205, and are sufficiently comprehensive to

cover all risks of personal injury, "of every name and nature," including those arising from the negligence of the defendant's servants.

But it does not appear that the plaintiff ever saw this pass, and she claims that she had no knowledge of the condition attached to it, and never assented to it. It is in testimony, however, that Miss Niles, who procured the pass at Brunswick, and Mrs. Remick, who presented it at the ticket office on the steamer, had both examined the terms of it, and knew that it contained a stipulation exonerating the defendant from liability for injuries. Miss Fannie Niles also learned from her sisters that there was such a condition on it. Miss Niles and Mrs. Remick both testify that in a conversation with the plaintiff, in going from Brunswick to Bath, on the evening of the accident, it was remarked, "in a joking way," that they must be very careful, as they were traveling on a pass, at their own risk, and could not recover any damages if they were injured; and on two or three other occasions, before they reached the wharf, allusion was made, in the plaintiff's hearing, to the fact that they were "on a pass, at their own risk." The plaintiff says she has no recollection of any such conversation, and never understood, as a matter of fact, that they were traveling at their own risk, by reason of express conditions on the pass, or otherwise. However that may be, the defendant contends that, in procuring the pass, Miss Niles may properly be deemed to have acted as agent for those who accepted its benefits, and that the plaintiff is legally chargeable with the knowledge possessed by her agent.

But, in the view here taken of the law, it is unnecessary to determine whether either of the ladies traveling on the pass ever read the conditions on the back of it, or had actual knowledge of the terms on which it was granted. It was evidently issued to "Miss Niles and three ladies," or contained some equivalent general description of the beneficiaries intended. The plaintiff consented to become one of them. It is immaterial that she was not the actual custodian of the pass. When she availed herself of the privileges secured by it, it became her pass, as fully and effectually as that of Miss Niles. She knew that it was a mere gratuity, and she had an opportunity to ascertain if any condi-

tions were attached to the gift. Her omission to inform herself of its terms could give her no additional rights. The acceptance of a conditional gift necessarily involves a compliance with the conditions. A person accepting and traveling upon a free pass, with conditions clearly expressed upon it, must be deemed to have accepted it upon such conditions, whether he reads them or not. This doctrine is elementary in the law of contracts, and is distinctly supported by the authorities respecting agreements for the carriage of passengers as well as contracts for the transportation of goods and other bailments.

In *Quimby v. Railroad Co.*, *supra*, the plaintiff was traveling on a free ticket which he had solicited as a pure gratuity from the general manager of the company. On the back of it was printed an agreement that he should assume all risk of accidents, and on the face of it were these words: "Provided he signs the agreement on the back hereof." In fact, however, this agreement was not signed by the plaintiff, but the court said: "The fact that the plaintiff had not signed it, and was not required to sign it, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not." In *Fonseca v. Steamship Co.*, 153 Mass. 553; 27 N. E. Rep. 665, it appeared that the plaintiff's attention was not called to the provisions of his passage ticket limiting the defendant's liability, but the court held that the defendant had a right to assume that he assented to its provisions, and that they were equally binding on him as if he had read them.

With respect to this question, the rules of law are applicable alike to contracts for the carriage of passengers and for the transportation of goods. In *Hill v. Railroad Co.*, 144 Mass. 284; 10 N. E. Rep. 836, there was a clause in the shipping agreement limiting the liability of the company to certain valuations. The plaintiff offered evidence that his agent never read the shipping agreement which he signed, although he had full opportunity to do so, and did not in fact know that it contained any valuation of the animals. But it was held that the plaintiff was bound by the agreement made in his behalf by his agent. So, in *Squire v. Railroad*, 98 Mass. 239, it was held that the plaintiff was bound by a similar shipping agreement, although his agent signed it

without reading it or informing himself of its contents. See, also, *Grace v. Adams*, 100 Mass. 505; *Railroad v. Chipman*, 146 Mass. 107; 14 N. E. Rep. 970; *Hill v. Railroad Co.*, 73 N. Y. 351; *Parke v. Railway Co.*, 2 C. P. Div. 416; *Harris v. Railway Co.*, 1 Q. B. Div. 515. The same principle is illustrated in contracts other than for transportation. *Reinstein v. Watts*, 84 Maine, 139; 24 Atl. Rep. 719, and authorities cited; *Rice v. Manufacturing Co.*, 2 Cush. 80; *Insurance Co. v. Buffum*, 115 Mass. 343.

Upon this branch of the case at bar, the following instructions, among others, were requested by the defendant, viz.:

"A person accepting and traveling upon a free pass, with certain conditions upon it, must be deemed to have accepted it on such conditions, whether he reads and signs them or not."

"If the pass was written to 'Miss Niles and three ladies,' or in any other similar general terms, and the plaintiff accepted it, and intended to go upon it, as one of the ladies referred to in it, then the plaintiff would be bound by the terms of the pass, and cannot recover."

These requests were evidently prepared with direct reference to the authorities above cited and the principles above stated, but the presiding judge refused to give the former request, and, with respect to the latter, said to the jury: "I give you that with this addition: that if she accepted it, and knew the conditions that the pass imposed." The judge further instructed the jury upon this point, *inter alia*, as follows: "It is not sufficient that the writing was on the back of the pass which was in the hands of Miss Niles. * * * In order to relieve the defendant company from liability under that contract, the words written upon the back, placed there by the common carrier, must have been assented to by the person receiving the benefit of the pass. * * * If you should find that she expected to travel on a pass, simply, without knowing that any conditions were attached to it, * * * or if she never assented to the conditions, then the defendant would be liable for the negligence of its servants."

This language of the charge, in connection with the refusal to give the requested instructions, necessarily gave the jury to understand that something more was required of the plaintiff than the acceptance and use of the pass, to constitute an assent to the conditions imposed. This must be deemed erroneous.

3. The plaintiff finally sets up the more radical contention that the condition on the back of the pass is not a valid and binding one, for the reason that it is not competent for a common carrier of passengers to stipulate against liability for injuries arising from his negligence. It is accordingly insisted that the instruction of the presiding judge that the plaintiff could not recover if she assented to the terms of the pass, imposing nonliability as a condition of granting it, was too favorable to the defendant, and, even if there was error in the ruling above considered, respecting the evidence of such assent, the defendant is not aggrieved, and exceptions ought not to be sustained.

It is an undisputed fact, in evidence in this case, that there was no valuable consideration whatever for the granting of the pass. It was purely a matter of courtesy and gratuity. This court is thus, for the first time, brought face to face with the inquiry whether public policy will tolerate the exemption of a carrier from liability for injuries to free passengers, resulting from the negligence of his servants. The precise question has not often been decided in other jurisdictions, but it is one with respect to which courts of great respectability and high authority have reached opposite conclusions. It cannot be said that there is any established or prevailing American doctrine upon the question, and the court is free to adopt the view which seems to be most in harmony with the principles of justice and sound reason, and such considerations of public welfare as may be involved in the inquiry.

The general doctrine of bailments has always been subject to the watchful care and scrutiny of public policy, and the law of common carriers has undoubtedly been developed and molded under its controlling influence. But the carriage of passengers is not bailment, properly speaking; and, while there are obvious analogies between this service and the transportation of goods, the distinction between them, though practically modified in the progress of society, has never been abrogated by the law. A public carrier may transport both passengers and goods by the same conveyance and at the same time, but the nature of the responsibility incurred with respect to them is legally different. As a common carrier of goods he is an insurer against everything but the act of God and the public enemies. As a carrier of pas-

passengers he is liable for the utmost care and vigilance consistent with the character and mode of the conveyance, but is not accountable for failure to take every possible precaution against danger and accident. *Libby v. Railroad Co.*, 85 Maine, 34; 26 Atl. Rep. 943, and authorities cited. It must be kept in mind, however, that a common carrier is one who undertakes, for hire, to transport the goods of all who choose to employ him, and that no person is in law deemed a common carrier who does not carry for hire. *Edw. Bailm.* 426; *Schouler Bailm.* § 405; *Hutch. Carr.* § 57. So when it is declared in *Willis v. Railway Co.*, 62 Maine, 489, to be well-settled law that common carriers cannot stipulate for exemption from responsibility for losses occasioned by the negligence of themselves or their servants, reference is had only to contracts to carry goods for hire. But ever since the "well-ordered exposition of the English law of bailments" in the celebrated case of *Coggs v. Bernard*, 2 *Ld. Raym.* 909; 1 *Smith Lead. Cas.* 354, those who undertake the gratuitous carriage of goods are deemed private carriers, and held liable only as mandataries; that is, only for losses resulting from gross negligence. And these may, by contract, protect themselves against liability for all losses except those occasioned by their malfeasance or fraud. *Hutch. Carr.* § 14. It is true that in the absence of any agreement to the contrary, when a carrier has admitted a person to the rights of a passenger, he owes him the same care and protection, when traveling on a free pass, as when he has paid the usual fare. Otherwise than this, there seems to be nothing suggested by the analogies between the settled law of common carriers of goods and that of passenger carriers which militates against the right claimed for the latter to protect themselves by contract against liability for negligence with respect to gratuitous passengers. .

It has been the tendency of the English courts, from an early period, to recognize the power of carriers to limit their liability with respect to both goods and passengers; and, under the construction given to the several acts of parliament in later years, a common carrier in England has practically unlimited power to provide by contract against liability for negligence. In *McCawley v. Railway Co.*, (1872) *L. R.*, 8 *Q. B.* 57, the plaintiff was traveling on a "drover's pass," which provided that he should travel at his own risk, and it was held that the defendant was not

liable even for gross negligence. COCKBURN, Ch. J., said: "It was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable." QUAIN, J., said: "Negligence, even gross, is the very thing which the contract stipulates that the defendant shall not be liable for." See, also, *Gallin v. Railway Co.*, L. R., 10 Q. B. 212; *Alexander v. Railway Co.*, 33 U. C. Q. B. 474.

The decisions of the New York and New Jersey courts also fully sustain the right of the carrier to contract with free passengers against liability for all degrees of negligence, provided the exemption is in clear and unmistakable terms. *Wells v. Railroad Co.*, 24 N. Y. 181; *Poucher v. Railroad Co.*, 49 N. Y. 263; *Magnin v. Dinsmore*, 56 N. Y. 168; *Dorr v. Navigation Co.*, 11 N. Y. 485; *Kinney v. Railroad Co.*, 32 N. J. Law, 409. See, also, *Railroad Co. v. Bishop*, 50 Ga. 465. Some courts seek to distinguish the different degrees of negligence, and concede the right to make such exemption as to a free passenger in all cases of ordinary negligence, but decline to extend the doctrine to cases of gross negligence. *Railroad Co. v. Read*, 37 Ill. 484; *Railroad Co. v. Mundy*, 21 Ind. 48. And others refuse to give effect to any stipulation absolving the carrier from liability for any degree of negligence. *Railroad Co. v. Henderson*, 51 Penn. St. 315; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Jacobus v. Railroad Co.*, 20 Minn. 125 (Gil. 110); 18 Am. Rep. 360; *Railroad Co. v. McGown*, 65 Tex. 640.

In the great case of *Railroad Co. v. Lockwood*, 17 Wall, 357, the federal court reached the conclusion that a condition on a "drover's pass," requiring the person using it to travel at his own risk, was not a valid and effectual one, and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision is put on the ground that a drover's pass was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one. At the close of the elaborate opinion in the case is a distinct finding "that a drover traveling on a pass such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." The same doctrine was applied in the later case of *Railway Co. v. Stevens*, 95 U. S. 655. There the servant of an

inventor obtained a pass to see an officer of the road in regard to the use of a new coupling. As in the case of the drover, it was held that he was a passenger for hire, and not bound by the condition that he should travel at his own risk. In each of these cases it is explicitly stated that it was not the purpose of the court to express any opinion as to the result which might have been reached if the plaintiff had been a free passenger, instead of one for hire. These decisions of the federal court, therefore, have no application to the precise question here raised. See an interesting discussion of this question by Mr. Schouler in *American Law Review* for March-April, 1892.

On the other hand, the highest courts of Massachusetts and Connecticut, in able and exhaustive opinions of recent date, have held, confidently and without hesitation, that such special contracts, relieving the carrier from liability to free passengers, are not forbidden by any principle of public policy. *Griswold v. Railroad Co.*, 53 Conn. 971; 4 Atl. Rep. 261; *Quimby v. Railroad Co.*, 150 Mass. 865; 28 N. E. Rep. 205. In the former case (decided in 1885) the plaintiff's intestate was a youth employed by the keeper of a railroad restaurant, and had a free pass, conditioned that he should travel at his own risk. He used it especially in running on the train to sell fruit and sandwiches, but at the time of the accident was traveling on his private account, as the pass authorized him to do. The court, finding that the railway had no direct interest in the restaurant, or the traffic on the cars, decided that the plaintiff was strictly a free passenger; and, although he was killed in a collision resulting from the gross negligence of the defendant's servants, it was held, after a careful examination of the authorities, that he was bound by the terms of his pass, and the defendant was not liable.

But *Quimby v. Railroad Co.*, supra, is an important authority still more directly in point. In this case the plaintiff was unquestionably a free passenger. The pass was given him "at his own solicitation, and as a pure gratuity," with a condition upon it that he should "assume all risk of accident, of every name and nature." In the opinion, by Mr. Justice DEVENS, the court says: "In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. * * * The service which he undertakes to render is

outside of his regular duties. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants."

This result seems to be clearly in harmony with the principles of justice and common right. The term "public policy," or "policy of the law," suggests but a vague and uncertain principle, and sometimes seems to be invoked as authority for a decision when a more definite reason cannot readily be assigned. In what manner the public welfare or the safety of human life is involved, or any of the cherished interests of the law are invaded, by allowing one out of a hundred passengers to travel on a pass at his own risk, does not clearly and satisfactorily appear. In most instances, it is believed, free passes are solicited by the traveler, not proffered by the carrier. The fact that a gratuitous passenger must travel at his own risk will surely operate as an incentive to greater care and caution on his part, and tend to diminish the number of passes issued. The probability that the cases of free transit will be so numerous as to induce any relaxation of the rules of prudence and vigilance on the part of the carrier is too remote to have weight as argument. He is constantly, and, it would seem, sufficiently reminded of his obligations to the public, in the most forcible and effectual manner, by the numerous claims and large verdicts in favor of those injured who travel for hire. Nor is the number of passes likely to be so great as to involve the public interest by an increase in the rates of fare. In this state, furthermore, the rates of fare on railroads are subject to the control of the legislature or the railroad commissioners. Rev. St. chap. 51, §§ 9, 43.

In this case there is no suggestion of defective appliances or incompetent servants. The gangplank was used continuously after the accident as before. It is claimed that there was negligence on the part of the defendant's servants in the adjustment and management of the gangplank, under the peculiar conditions existing at that time. It is not pretended that there was any

willful misconduct, and it cannot reasonably be claimed that there was gross negligence on the part of the defendant. There is, therefore, no occasion to draw a distinction between the degrees of negligence, if such a distinction is deemed legal and practicable in any case.

The conclusion is that one who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition, whether he reads it or not; and such a contract is not prohibited by any rule of public policy in this state, but is effectual to exonerate the carrier from liability for the negligence of his servants.

Exceptions sustained.

HASKELL, J., concurred in the result only.

1. **Gratuitous passengers — limiting liability for negligence.**— The cases on this question are collected in note to *Muldoon v. Seattle City R. Co.*, 9 Am. R. R. & Corp. Rep. 715. The case of *Muldoon* has again been before the Supreme Court of Washington, and that court has again affirmed the position that a person receiving a free pass on a railroad is bound by the conditions printed thereon in regard to personal injuries due to the carrier's negligence, and also decided that the fact that plaintiff was unaware of the conditions printed on the back of the pass is immaterial. *Muldoon v. Seattle City Ry. Co.*, (Wash.) 38 Pac. Rep. 995. It was also held in the same case that in an action against a carrier for personal injuries received by plaintiff while riding on a free pass, plaintiff is estopped to assert that the pass was void, being issued to him as a public officer, in violation of the law. *Ibid.*

2. **A contract limiting liability is governed by the *lex loci contractus*.**— A contract by a carrier, limiting its liability for damage occasioned by its negligence, is governed by the *lex loci contractus*. *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Penn. St. 527; 24 Atl. Rep. 79; *Potter v. The Majestic*, 9 C. C. A. 161; 60 Fed. Rep. 624; *Wufferman v. The Carib Prince*, 63 Fed. Rep. 266.

3. **Express messengers — effect of contract between express company and railroad company limiting liability of the latter.**— An express messenger in charge of an express car carried upon a railroad in pursuance of a contract between his employer and the railroad company, is not chargeable, in the absence of actual notice, with knowledge of a stipulation therein, under which it is claimed that the railroad company is exempt from liability for negligently causing his death. *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59; 26 N. E. Rep. 324. The contract with the express company cannot operate to relieve the railroad company from the same duty to protect the messenger that it owes any other passenger, or from the same liability for its

* Reported in 29 Atl. Rep. 1069.

negligence. Ibid. This decision was by the Second Division. The Court of Appeals proper in a case shortly after decided came to the same conclusion on different grounds. *Kenney v. New York Central & H. R. R. Co.*, 125 N. Y. 422; 26 N. E. Rep. 626. They held that a carrier's contract of immunity from the consequences of the negligence of its employees must be expressed in unequivocal terms, and that it was not so expressed in the contract in question. The contract in question provided that the railroad company is "hereby expressly released from and guaranteed against any liability for any damage done to the agents of the [express company], whether in their employ as messengers or otherwise."

4. Effect of limitations on back of passage ticket — when void as amounting to a mere notice.— A steamship passenger ticket contained an agreement to carry a passenger and a certain quantity of luggage, and included several notices and directions, but did not refer to any other conditions. At the bottom were the words "See back," and on the back of the ticket was a statement that the ticket was subject to several conditions, among which was one attempting to relieve the carrier from liability for perils of the sea. Held, that this condition was not binding, since it was an attempt to limit the carrier's common-law liability by a mere notice, not incorporated into the contract of carriage. *Potter v. The Majestic*, 9 C. C. A. 161; 60 Fed. Rep. 624. In this case the contract was made in England and was decided upon common-law principles. The condition referred to was as follows: "(3) Neither the shipowner nor the passage broker or agent is responsible for loss of or injury to the passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the steamer, her machinery, gear or fittings, or from act of God, queen's enemies, perils of the sea or rivers, restraints of princes, rulers and peoples, barratry or negligence in navigation, of the steamer or of any other vessel." Of this the court says: "Turning now to the ticket which was issued to the libelants, we find that certain directions are expressed in the body of the ticket, which, with two notices to passengers, are expressly said to form part of the contract, and no other condition is referred to in the body of the agreement. At the foot of the page, by the words 'See back,' the purchaser is referred, under the heading 'Notice to Passengers,' to important modifications of the carrier's liability as expressed on the face of the contract. If these conditions are to be construed as a part of the express contract, they make a clumsily and inartificially drawn document. They are of such a vital character that they should have been embodied in the contract, or unmistakably made a part of it. There is no reason why agreements of this nature should not be so distinctly and definitely stated or referred to in the body of the contract as to remove all uncertainty on the part of courts, or cause of complaint on the part of the passenger. The modifications in the third condition of the agreement entered into upon the face of the ticket, and which did not allude to these proposed modifications, are so great that they cannot be considered to have been made by special contract in the absence of evidence of positive assent upon the part of the purchaser of the ticket or of the passenger."

5. When stipulations on back of ticket in the form of a notice will be held valid as regulations, though limiting liability — effect of

failure to read conditions.— In the case last cited it is also held that a condition on the back of such ticket limiting the carrier's liability for baggage to ten pounds, unless extra payment is made, is binding on the passenger, where he receives the ticket in time to examine it thoroughly before embarking, since the extent of a carrier's liability for baggage, being not definitely fixed by the common law, is subject to reasonable regulation by the carrier. The stipulation referred to reads as follows: "(4) Neither the shipowner nor the passage broker or agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the passenger beyond the amount of ten pounds, unless the value of the same in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary and valuables of any description, upon which one per cent will be charged) is paid." Upon the distinction between this condition and the one referred to in the last section, and upon its binding effect under the facts disclosed, the court says: "The regulation in regard to a limitation of liability for the value of baggage of which the carrier is not informed, and the amount of a risk for which he is not paid, rests upon a different principle. The common-law liability of common carriers for the safety of baggage for travelers is not exactly defined, but it is not unlimited. The carrier is not to be called upon to take an unusual quantity of trunks, as the baggage of a single traveler, nor is he under obligations to pay large sums for the value of articles which are in excess of a traveler's ordinary wants. The rule which the common law laid down upon this subject is well understood. 'The contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations.' *Railroad Co. v. Swift*, 12 Wall. 272. And, therefore, as this obligation on the part of the carrier is not unlimited, but is at common law not exactly defined, the carrier has a right, 'by reasonable regulations, of which the passenger has knowledge,' to define and make certain to both parties the extent of an implied undertaking to carry baggage (*Railroad Co. v. Fraloff*, 100 U. S. 29), and of an express undertaking where the contract includes baggage by name; for an express contract which simply mentions baggage would not be construed to mean baggage unlimited in quantity or in value. By the contract in question the amount of space which the baggage could occupy was expressly provided for. The power of the carrier to define by regulations, communicated to the traveler, the amount of his pecuniary liability for baggage, has been well understood in the law of England and in this country. 'It is undoubtedly competent for carriers of passengers by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duty to the public, to protect themselves against liability, as insurers, for baggage not exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk.' *Railroad Co. v. Fraloff*, *supra*. The regulations or the notices upon the tickets or contracts which bring this class of limitations home to the knowledge of the passenger are of a very different character from the notices of which we have been speaking, and

which limit or attempt to annihilate the common-law responsibility of a carrier. This class of regulations is intended to make certain what is uncertain, to define what is otherwise indefinite, to prevent mistakes, complaint and litigation, and to promote fairness of dealing. The ticket was purchased by the father of the young lady passengers, a gentleman of large business experience, who had frequently used similar tickets. He kept the ticket for a while in his office in London, but did not read it, and had never read the tickets which he had purchased for his own use. He had abundant opportunity to read it, and to make himself familiar with the reasonable and ordinarily well-understood regulations of carriers by land or sea in regard to baggage. The regulation was distinctly brought to the knowledge of Mr. Potter by his reception of the ticket (which was far more than the ordinary railroad check, indicating the two points between which the passenger is to be carried), in ample time to make himself acquainted with its regulations. He was not hurried on board with no opportunity to know the rules of the company, and it cannot be safely asserted that with adequate means of knowledge placed in his hands, and with ample opportunity to possess himself of the information which the carrier gave him, knowledge of the regulations was not brought home to him." *Potter v. The Majestic*, 9 C. C. A. 161; 60 Fed. Rep. 624.

PITTSBURGH, C., C. & ST. L. R. CO. v. BACKUS, Treasurer of
Marion County.

(Supreme Court of the United States, May 26, 1894.)

1. RAILROAD COMPANIES. ASSESSMENT FOR TAXATION IN STATE. DUE PROCESS OF LAW. The act of Indiana of March 6, 1891, providing for assessment of railroad property for taxation by a state board, does not fail of due process of law in that it does not require personal notice before the assessments are made final assessments, as the statute names the time and place of meeting of the board; nor in that it does not require the board to grant a hearing for correction of errors, as by the construction of the act by the Supreme Court of the state a right to such hearing is given; nor for want of notice and opportunity to be heard after the determination by the board, as a rehearing is not essential; and the fact that but one hearing before the board is given to railroad companies, while the ordinary taxpayer, whose property is assessed by county officials, after hearing before them, has a right of appeal and a hearing before the state board, is not a denial to the railroad companies of the equal protection of the laws.

2. ASSESSMENT OF ROLLING STOCK. The provision of the act of Indiana, March 6, 1891, in regard to taxation of railroad property, that rolling stock shall be listed and taxed in the several counties in the proportion that the main track used or operated in such county bears to the length of the main track used or operated by the company, in connection with the requirement of a statement of the amount of capital stock and indebtedness, is not invalid as

requiring assessment and valuation of property outside the state, as the intent of the act to reach simply property of the railroad company within the state is obvious from its other provisions and its general scope, and it does not require the valuation of such property to be determined absolutely on a mileage basis.

8. **ASSESSMENT OF RAILROAD TRACK WHERE PART OF LINE WITHIN STATE AND PART WITHOUT.** The assessment for taxation of the property within the state, of a railroad company whose road extends outside the state, cannot be adjudged excessive and illegal upon testimony that the valuation was excessive, and that portions of the road outside the state were of largely greater value than any similar length within the state, unaccompanied by evidence that the assessing board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration such excessive value of portions outside the state.

THIS was an action by the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company against Victor M. Backus, as treasurer of Marion county, Indiana, and others, brought in the Superior Court of that county, to restrain the collection of taxes on plaintiff's property. The court rendered judgment for defendants, which, on appeal, was affirmed by the Supreme Court of the state. 133 Ind. 625; 33 N. E. Rep. 432. Plaintiff brought error.

On March 6, 1891, the legislature of the state of Indiana passed an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency" (Laws of 1891, pp. 199-291), which, expressly repealing "all laws and parts of laws within the purview of this act," provided in itself a complete and comprehensive system of taxation. By it all property of individuals and ordinary corporations was subject to valuation and assessment by county officers, while the assessment of railroad property was committed to a state board of tax commissioners, composed of the governor, secretary of state, auditor of state and two appointees of the governor. To this board, in addition to the assessment of railroad property, was given the duty of equalizing the assessment of real estate throughout the state, as well as of entertaining appeals from the decisions of the several county boards. This method of assessing railroad property by a state board, as distinguished from the assessment of ordinary property through county officers, was not by this act for the first time introduced into the legislation of Indiana, though by it some changes were made in the organization of the state board and in the details of procedure.

By section 129 the board was required to "convene in the office

of the auditor of state, on the first Monday of August each year, for the purpose of assessing railroad property and equalizing the assessment of real estate, as provided in this act," and "is hereby given all the powers given to county boards of review." By section 132 authority was given to adjourn from time to time, with a proviso that "the duration of their sessions shall not exceed forty days." Section 3 is in these words:

"Sec. 3. All property within the jurisdiction of this state, not expressly exempted, shall be subjected to taxation."

In section 4 it is provided: "Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder."

By section 8 personal property was to be listed for taxation as of the first day of April in each year.

The property of railroad corporations was divided into two classes — railroad track and rolling stock — and, by sections 78 and 80, defined as follows:

"Sec. 78. Such right of way, including the superstructures, main, side or second track and turnouts, turnable, telegraph poles, wires, instruments and other appliances, and the stations and improvements of the railroad company on such right of way, (excepting machinery, stationary engines, and other fixtures, which shall be considered personal property), shall be held to be real estate for the purpose of taxation, and denominated 'railroad track.'"

"Sec. 80. The movable property belonging to a railroad company shall be held to be personal property, and denominated, for the purpose of taxation, 'rolling stock.'"

Between the first of April and the first of June of each year the railroad companies were required to make certain reports to the county auditors. Section 85 is as follows:

"Sec. 85. At the same time that the lists or schedules as hereinbefore required to be returned to the county auditor the person, company or corporation running, operating or constructing any railroad in this state shall, under the oath of such person, or the secretary or superintendent of such company or corporation, return to the auditor of the state sworn statements or schedules, as follows:

"First. Of the property denominated 'railroad track,' giving

the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the state.

“Second. The rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this state.

“Third. Showing the number of ties in track per mile, the weight of iron or steel per yard used in the main and side tracks, what joints or chairs are used in track, the ballasting of road, whether gravel, stone or dirt, the number and quality of buildings or other structures on ‘railroad tracks,’ the length of time iron or steel in track has been used, and the length of time the road has been built.

“Fourth. A statement or schedule showing :

“1st. The amount of capital stock authorized and the number of shares into which such capital stock is divided.

“2d. The amount of capital stock paid up.

“3d. The market value, or if no market value, then the actual value of the shares of stock.

“4th. The total amounts of all indebtedness except for current expenses for operating the road.

“5th. The total listed valuation of all its tangible property in this state. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of state.”

Section 137 provides :

“Sec. 137. Said board shall also assess the railroad property, denominated in this act as ‘railroad track’ and ‘rolling stock’ at its true cash value, and said board is hereby given the power and authority, by committee or otherwise, to examine persons or papers.”

Between April 1, 1890, and April 1, 1891, the plaintiff in error (plaintiff below) was created by the consolidation of several corporations theretofore existing. Its entire length of main track was 1,145.87 miles, of which 647.42 miles were in Indiana, 27.99 in Illinois, 403.33 in Ohio, 19.48 in West Virginia, and 47.65 in Pennsylvania. The Indiana portion of the property belonging to this corporation, including both railroad track and rolling stock, was assessed in 1890 at \$8,538,053. The assessment of the like

property under the act of 1891 amounted to \$22,666,470. Thereafter and on April 19, 1892, the company commenced this suit in the Superior Court of Marion county, to restrain the collection of taxes based upon the assessment of 1891, on the double ground that the act of 1891 was unconstitutional, and that, if constitutional, it had been so administered as to create an illegal assessment of the company's property. A tender was made of the amount which would be due according to the valuation placed upon the property in 1890, and, as we understand, this amount has been, under an arrangement between the parties, paid into the different county treasuries. Issue having been joined, the case was heard, and a decree rendered finding the equity of the case with the defendants, and denying the application for an injunction. On appeal to the Supreme Court of the state this ruling was sustained (133 Ind. 625 ; 33 N. E. Rep. 432); and, to reverse the final decree of that court, the plaintiff sued out this writ of error.

Jno. M. Butler, A. H. Snow and S. Q. Pickens, for plaintiff in error. *A. G. Smith, Attorney-General, Indiana, Wm. A. Ketcham, Albert J. Beveridge and John W. Kern*, for defendants in error.

BREWER, J. (*after stating the facts*). The decision of the Supreme Court of the state removes from this case all questions of conflict between the act and the Constitution of the state, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights which the Federal Constitution secures to the plaintiff. Notwithstanding the elaborate attack made both in brief and argument upon this act, it seems to us that its constitutionality has been practically settled by the decisions of this court, especially those in State Railroad Tax cases, 92 U. S. 575, and Kentucky Railroad Tax cases, 115 U. S. 321 ; 6 Sup. Ct. Rep. 57. In both of those cases legislation providing for the assessment of railroad property by a state board, while all other property in the state was assessed by county officials, was held to be obnoxious to no provision in the Federal Constitution. Counsel deny the applicability of those two cases, on account of differences between the Constitutions of Illinois and

Kentucky and that of Indiana, the Constitution of Illinois expressly authorizing the legislature to classify property for taxation, and only requiring uniformity as to the class of property upon which the particular law operates, and that of Kentucky containing no provision requiring taxes to be levied by a uniform method upon all descriptions of property. A sufficient answer to this is that the decision of the Supreme Court of Indiana in this case is conclusive upon us that the Constitution of the state authorizes just the method of assessment adopted in this case.

It is contended specifically that the acts fails of due process of law respecting the assessment, in that it does not require notice by the state board at any time before the assessments are made final; and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary. In State Railroad Tax cases (p. 610) are these words, which are also quoted with approval in the Kentucky Railroad Tax cases:

“This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.”

Again, it is said that the act does not require the state board to grant the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board, and also that it gives to the board arbitrary power to deny to plaintiffs any hearing at any time; but the fact and the law are both against this contention. The plaintiff did appear before the board and was heard by its counsel and through its officers; and the construction placed by the Supreme Court of the state on the act — a construction which is conclusive upon this court — is that

the railroad companies are given the right to be present and to be heard.

It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board, as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings and new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect. It not infrequently happens in this as in all other courts that decisions are announced and judgments entered on the last day of the term, and too late for the presentation and consideration of any petitions for rehearing or motions for a new trial. Will any one seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party, having been fully heard once upon the merits of his case, is deprived of the constitutional protection because he is not heard a second time?

Equally fallacious is the contention that because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals Act by congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than \$5,000, was given but a single trial, and in that court, while, if the amount in dispute was over that sum, the

defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?

Again, the act is challenged as permitting and requiring the assessment and valuation of property outside the state. This contention is based largely on the provisions in section 80 that the "rolling stock shall be listed and taxed in the several counties * * * in the proportion that the main track used or operated in such county * * * bears to the length of the main track used or operated by such person, company or corporation," and the requirement in the schedule to be returned to the auditor of state of a statement of the amount of capital stock and indebtedness. We do not think that the matters referred to justify any such imputation. It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the state. It is not necessary that every section of a tax act should, in its terms, declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear. Section 79, which refers to the matter of "railroad track," in terms provides that "the value of 'railroad track' shall be listed and taxed in the several counties, townships, cities or towns in the proportion that the length of the main track in such county, township, city or town bears to the whole length of the road in this state, except the value of the side or second track. and all the turnouts, and all station houses, depots, machine shops or other buildings belonging to the road, which shall be taxed in the county, township, city or town in which the same are located." And while section 80, treating of rolling stock, does not repeat this express limitation, yet it is manifestly implied, not merely from its following immediately after section 79, and from the general scope of the act, but also from the schedule required to be returned to the auditor of state, the 1st and 2d clauses of which are as follows:

"First. Of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the state.

“Second. The rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this state.”

It is obvious that the intent of this act was simply to reach the property of the railroad within the state, and these provisions in respect to apportionment relate simply to apportionment between the different counties, townships, towns, cities, etc., within the state. No intent to the contrary can be deduced from the provision requiring the corporation to file a statement of its total stock and indebtedness, for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the state. The stock and indebtedness represent the property. As said by Mr. Justice MILLER in *State Railroad Tax cases* (p. 605): “When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.”

In *Franklin Co. v. Railroad Co.*, 12 Lea, 521, 539, the Supreme Court of Tennessee, in a well-considered opinion, which was quoted with approval by this court in *Railway Co. v. Wright*, 151 U. S. 470, 479; 14 Sup. Ct. Rep. 396, thus referred to the means of ascertaining the value of a railroad track:

“The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends — its traffic, as evidenced by the rolling stock and gross earnings, in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon

sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Counsel sought in argument to narrow the meaning of the words "railroad track" and "rolling stock" as though the two did not include the entire railroad property; but evidently the Supreme Court of the state construed, and as we think, properly, the two terms as embracing all which goes to make up what is strictly railroad property. By section 3 of the act it is provided that all property in the state shall be subject to taxation unless expressly exempted; by section 4, that, when the property of a corporation is taxed to the corporation, the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property, or any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms "railroad track" and "rolling stock." Obviously, it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the state to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called "railroad property;" and, when the statute provides that such property shall be assessed at its "true cash value," it means to require that it shall be assessed at the value which it has, as used, and by reason of its use.

When a road runs through two states it is, as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that, when the value of a road running in two states is ascertained, the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless, it is ordinarily true, that, when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of

the whole road. This mode of division has been recognized by this court several times as eminently fair. Thus, in State Railroad Tax cases, on page 608, it was said :

“ It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.”

And again, on page 611 :

“ This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. Delaware Railroad Tax case, 18 Wall. 206 ; Erie Ry. Co. v. Pennsylvania, 21 Wall. 492.”

The mileage basis of apportionment was also sustained in *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530 ; 8 Sup. Ct. Rep. 961 ; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 ; 11 Sup. Ct. Rep. 876 ; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217 ; 12 Sup. Ct. Rep. 121, 163 ; *Railroad Co. v. Gibbes*, 142 U. S. 386 ; 12 Sup. Ct. Rep. 255 ; *Railway Co. v. Wright*, 151 U. S. 470 ; 14 Sup. Ct. Rep. 396. It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where, in certain localities, the company is engaged in a particular kind of business, requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether, in any particular case, such matters are taken into consideration by the assessing board, does not make against the validity of the law, because it does not require that

the valuation of the property within the state shall be absolutely determined upon a mileage basis.

Our conclusion, therefore, is that this act is not obnoxious to any of the constitutional objections made to it. There remains the further question whether, in the actual administration thereof in this case, there has been any illegal assessment of the property of the plaintiff. It is charged that the valuation was increased from \$8,538,053 in 1890 to \$22,666,470 in 1891, and it is not to be denied that such a great increase suggests that which is unfortunately too common — an effort to cast an unreasonable proportion of the public burdens upon corporate property. It is stated by counsel for plaintiff in their brief that the increase from 1890 to 1891 in the valuation of all other than railroad property in the several counties through which its road extends was only forty-three per cent, while, as appears, that of the property of the plaintiff was more than 150 per cent. Still, it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be adjudged illegal.

The bill of exceptions discloses these proceedings on the hearing: The plaintiff offered the record of the action of the state board for the year 1890, showing an assessment, as heretofore stated, so much less than that of 1891, which record was rejected as irrelevant and immaterial. Thereupon the plaintiff offered the record of the proceedings of the board in 1891, which was admitted. This recited the appearance of the plaintiff by its officers, and that they were heard as to the proper valuation. It also contained a table by counties of the assessment as made by the board, closing with this certificate:

“Making liberal allowances for all proper deductions, the state board of tax commissioners has fixed the values of the respective railroads and parts of roads within the state of Indiana for taxation on the 1st day of April, 1891, as hereinbefore set forth.

“In arriving at the basis for the estimate of said values, the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the

gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same."

The return made by the plaintiff to the auditor of state for the year 1891, in accordance with the requirements of the statute, was also given in evidence, which return was upon a blank furnished by the auditor, and shows an aggregate valuation of about \$8,000,000. This return was sworn to by the general manager and secretary of the company. The second vice-president and general counsel of the plaintiff was called as a witness, and, after testifying to his familiarity with the property and its value, was asked the value in 1890, but, on objection, this testimony was ruled out. He was permitted, however, to give testimony as to the value in 1891, and his answer fixed that value in the aggregate at \$8,538,053, the same value that was placed upon the property by the state board in 1890. He was asked to state the average cash value per mile of the company's property in Indiana, and in the other states into which the company's road extended, treating the portion in each state as constituting a unit, separate and distinct from those of the portions in the other states, but an objection to this was sustained, and the testimony offered ruled out. He then testified as to the terminal facilities in the cities of Chicago and Pittsburgh belonging to the plaintiff, and their great value, and the absence of terminal facilities of any particular value in any of the cities in Indiana. He was then asked if the plaintiff owned any rolling stock which was used exclusively in any one of the five states in which it did business, but this question was ruled out. In response to further questions, he testified that the plaintiff had no rolling stock used exclusively within the state of Indiana for special purposes. Certain questions were also asked as to the notice or knowledge which the plaintiff had of the determination made by the state board in 1891 as to the valuation, but we have heretofore held that it is immaterial whether it had any notice thereof after the decision and prior to the adjournment of the board. The assistant engineer of the plaintiff was also called as a witness, and producing a written statement which he had presented to the state board prior to its determination, which statement goes at length into the mileage in the different states, the gross earnings, per cent of earnings,

and the value of the track, testified that the facts in such written statement were true. Another witness, the assistant comptroller of the plaintiff, was asked what per cent of the gross receipts of its Indiana business was derived from commerce beginning and ending wholly within the state, and what from interstate business; but, on objection, this testimony was ruled out. The secretary of state, who was a member of the state board, was also called, and testified that the members of the board did not make an official examination or inspection of the railroad track and rolling stock of the plaintiff, being personally acquainted therewith; that they did not summon before them, or examine under oath, any person or persons acquainted with the true cash value of the property. The plaintiff also offered the return made by the Terre Haute and Indianapolis Railroad Company to the auditor of the state for the year 1891, prepared upon the same form as that upon which the plaintiff's return was made; but it was ruled out as irrelevant and immaterial, as well as the action taken by the state board in respect to the valuation of the property of such road. This was, in substance, all the testimony offered by the plaintiff.

The defendants simply called the secretary of state, who testified that, in assessing the plaintiff's property, no assessment was made, except upon the railroad track and rolling stock of plaintiff within the state, and no assessment was made of any property of value outside the state.

Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the state board, and in this conclusion we concur. The true cash value of the plaintiff's property in the state of Indiana in the year 1891 was a question of fact, the determination of which, for the purposes of taxation, was given to this special tribunal—the state board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and, if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three

witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the state government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the state, and gave to the property within a value partly deduced from that without the state. The testimony, however, does not sustain this contention.

The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by first ascertaining the total value of the company's property, and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to wit, the value of that part of the company's road in the state of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value, as compared with the general line of the road, does not prove that the board did not take those peculiar matters into consideration. On the contrary, the reasonable presumption is that if its attention was called by the company to those facts it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company. Indeed, its certificate is affirmatively that it took into consideration "all other matters appertaining thereto that would assist the board in arriving at a true cash value" of the parts of the road within the state of Indiana. That the aggregate value of the entire property of the company was evidence properly receivable

and bearing upon the question of value of that part in Indiana is a proposition which, as we have heretofore said, is clearly established both on reason and authority. There is no evidence that the board had before it or considered any matter in reaching its determination which was not properly receivable and properly to be considered. A comparison of the assessment placed by the board upon the property of this plaintiff with that placed by it upon other roads, or portions of roads, within the state, is immaterial, unless coupled with an offer to show an identity in value; so that the case narrows itself down to this: Is testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meager testimony.

These are all the questions presented in this record, and, notwithstanding the shadow cast upon the action of the board by this large increase in valuation, we are forced to the conclusion, not only that the act is not open to the objections made to its constitutionality, but also that there is no sufficient testimony to impeach the conclusion and determination of the state board. The judgment of the Supreme Court of the state of Indiana, is, therefore, affirmed.

Case No. 900, brought by the Indianapolis and Vincennes Railroad Company to impeach the assessment made by the same board, in the same year, of its property, is so nearly like this in its material features that no separate statement of the special facts is necessary, and in that case, too, the judgment of the Supreme Court of the state of Indiana will be affirmed.

JACKSON, J., did not hear the arguments in these cases, or take any part in their decision.

HARLAN, J. (dissenting). The statute of Indiana of March 9, 1891, as construed by the Supreme Court of that state, authorized the state board of tax commissioners, in assessing the "railroad track" and "rolling stock" of the company in the state, to ascertain the market value of its property, and interests of every kind, within and without the state, including capital stock, bonds, earnings, franchise, equipment, etc., and, that being done, to take as the value of the company's track and rolling stock in Indiana for taxation such proportion of that aggregate amount as the number of miles of its road in that state bore to the aggregate miles of its road or roads within or without the state; and, by this rule of valuation, the state board of tax commissioners seem to have been governed. In the official report by the board of its proceedings for 1891, showing the basis on which the values of the railroads and parts of roads within the state had been fixed, it is said that "in arriving at the basis for the estimate of said values, the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same." The forms of printed returns supplied to railroad companies show that they were required to report such values and earnings in respect of all their property of every kind, wherever situated. Under the mode of assessment pursued property was taxed in Indiana that had no situs there, which was used in interstate commerce outside of Indiana, and could not properly be included in the company's railroad track and rolling stock in that state. I am of opinion that the statute, as construed and enforced by the state, imposed illegal burdens upon interstate commerce, under the guise of a valuation for purposes of taxation of property within the state. The board had no authority to impart to the value of railroad track and rolling stock within the state any part of the value of the company's various interests and property without the state.

There was some contention at the bar as to whether the state board, in fact, proceeded according to the rule of valuation to which I have referred. If I am in error in saying that it appears, affirmatively, from the record, that the board applied that rule, there can be no doubt that the state board construed the statute

as authorizing the adoption of such a rule. It is equally clear that evidence to prove that the board acted upon that rule was offered and excluded, and that a proper exception was taken. Such action upon the part of the court was itself sufficient to raise the question whether the statute, as interpreted by the state court, and as administered by the state authorities, was not obnoxious to the objection that it permitted illegal burdens to be imposed under the guise of local taxation upon interstate commerce, and the taxation of property not within the jurisdiction of Indiana.

Without referring to other grounds discussed at the bar, I dissent from the opinion and judgment in this case, upon the grounds above stated.

I dissent, upon the same grounds, from the opinion and judgment in cases 908 and 900.

I am authorized by Mr. Justice BROWN to say that he also dissents.*

TAXATION OF RAILROADS AND RAILROAD PROPERTY — RECENT DECISIONS.

1. **Exemptions from taxation, their construction and application.**— A clause in a railroad company's charter, that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent," is not void for uncertainty because no limit of capital stock is fixed, and no means provided for fixing the same, or ascertaining the dividends thereon; the amount of stock issued being known, and there being no difficulty in ascertaining the amount of profits from net earnings in any year applicable to payment of dividends. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486; 14 Sup. Ct. Rep. 968. In the act of Tennessee, January 28, 1848, incorporating the Mobile and Ohio Railroad Company, section 11 provided that the capital stock should be forever exempt from taxation, and the road, with all its fixtures and appurtenances, should be exempt for twenty-five years from its completion, and no tax should ever be laid on said road or its fixtures which would reduce the dividends below eight per cent. Held, that there being no requirement of the State Constitution that all property should be taxed, and the legislature having power to grant exemption from taxation in corporate charters, which, after acceptance, became irrevocable contracts, such an exemption was granted by the last clause of the section, construed in view of the history and circumstances of the grant, to the extent stated, and that clause was not a mere special and discriminating rule for taxation of the property after the period of twenty-five years, void for violation of the rule of uniformity and equality of taxation prescribed by the Constitution of Tennessee, 1834, article 2, section 28. FULLER, Ch. J., GRAY, BREWER and SHIRAS, JJ., dissenting. *Ibid.*

* Reported in 154 U. S. 421 ; 14 Sup. Ct. Rep. 1114.

Under the act of Illinois, February 10, 1851, section 22, which exempts the Illinois Central Railroad Company, incorporated by the act, "from all taxation of every kind, except as herein provided for," and provides that the taxes thereby imposed on the company shall be paid into the state treasury, and applied to the payment of state indebtedness, the exemption does not extend to a special tax to defray the cost of grading and paving a street, assessed on land forming a part of the company's right of way, on the ground that the property is enhanced in value by the improvement. 18 N. E. Rep. 315, affirmed. *McGee v. Mathis*, 4 Wall. 143, distinguished. *Illinois Central R. Co. v. City of Decatur*, 147 U. S. 190; 13 Sup. Ct. Rep. 293. Such charge is not within the exemption from "taxation," as being a special tax, rather than a special assessment, within the distinction recognized by the Constitution of Illinois, 1870, article 9, section 9, giving corporate authorities power "to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise," since the tax is for the cost of a local improvement charged upon the contiguous property benefited thereby. *Ibid.* To the same effect and under the same charter is *Illinois Central R. Co. v. City of Mattoon*, 141 Ill. 32; 80 N. E. Rep. 773.

A railroad company organized under Michigan statutes, providing that every company formed thereunder shall pay an annual tax upon the gross receipts, which tax "shall be in lieu of all other taxes upon the properties of such companies," is not exempt from the levy of assessments for local improvements. *Lake Shore & M. S. R. Co. v. Grand Rapids*, (Mich.) 60 N. W. Rep. 767.

An act of North Carolina, January 8, 1884, incorporating the W. & W. R. Co., provided in section 19 that such road should be free from taxation. Subsequent sections authorized the construction of branches, and provided that all powers, rights and privileges conferred by preceding sections in respect of the main road should extend thereto, in the laying out, construction, use and preservation of said branches. Held, that the privileges extended to the branches were limited to the purposes enumerated, and did not exempt the branch lines from taxation. *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279; 13 Sup. Ct. Rep. 72. By a subsequent act (2 Rev. St. N. C. 334, 335) the H. & W. R. Co., which had not been exempt from taxation, was absorbed into the W. & W. R. Co., its stockholders taking W. & W. stock in lieu of their own, and it was provided that the property of the absorbed road should be held in the same manner as all other property of the absorbing road. Held, that the absorbed road was not exempt from taxation. *Ibid.* The decision of the Supreme Court of North Carolina, which is affirmed in the foregoing, is reported under same title in 110 N. C. 137; 14 S. E. Rep. 652.

Acts of Missouri, 1847, page 157, gives to defendant company all the privileges and immunities which were granted to the Louisiana and Columbia Railroad Company by acts of 1836-1837, page 252, which provide, inter alia, "that the stock of said company shall be exempt from all state and county taxes." Act of September 20, 1852, granting lands to defendant, and accepted by it, provides that it shall "pay into the treasury of the state a sum of money equal to the amount of state tax on other real and personal property of like value for that year, upon the actual value of the roadbed * * * and other

property of said company," etc. Held, that this act in no way affects defendant's charter exemption from taxation for county purposes. *State ex rel. Trammel v. Hannibal & St. J. R. Co.*, 101 Mo. 136; 13 S. W. Rep. 505.

A township tax levied by the County Court to pay bonds issued in aid of a railroad is not a county tax within the meaning of a railroad company's charter exempting its stock from state and county taxes. *State ex rel. Hamilton v. Hannibal & St. J. R. Co.*, 113 Mo. 297; 21 S. W. Rep. 14; *State ex rel. Trammel v. Hannibal & St. J. R. Co.*, 101 Mo. 136; 13 S. W. Rep. 505. See, also, *State ex rel. Love v. Hannibal & St. J. R. Co.*, 101 Mo. 120; 13 S. W. Rep. 406.

The rule exempting from taxation for local purposes so much of a railroad company's property as is indispensable to the construction of the road, and fitting it for use, does not embrace the railroad repair shops, and they are liable for township and school taxes. *Pennsylvania & N. Y. Canal & R. Co. v. Vandyke*, 137 Penn. St. 249; 20 Atl. Rep. 653.

Under the charter of the V., P. & S. I. Ry. Co. (Acts Miss. 1873, p. 562), to which, by consolidation, the L., N. O. & T. P. Ry. Co. succeeded, allowing the company to obtain and hold any real and personal estate necessary and convenient for its construction and maintenance; and Acts of Mississippi, 1870, page 255, section 21, exempting such property of the M. & N. W. Ry. Co. from taxation in the counties where situated; and Acts of Mississippi, 1882, page 1011, chapter 555, conferring this exemption upon the consolidated roads — the L., N. O. & T. P. Ry. Co., one of the consolidated roads, is not subject to taxation on a mile and a half of spur track and a steam digger, used to reach a gravel pit and get the gravel for the purpose of repairing its main line. *Louisville, N. O. & T. R. Co. v. Taylor*, 68 Miss. 361; 8 South. Rep. 675.

A tract of land owned by a railway corporation, upon which it had constructed a dock or wharf, renting the same to another corporation, engaged in the business of selling and shipping coal, and for the purposes of such business, is not exempt from ordinary taxation as property held and used for railway purposes, although by the terms of the lease the tenant was under obligation to perform certain service in its line of business for the railway corporation, and also obliged to furnish a certain amount of freight annually for transportation over its lines of railway. *St. Louis County v. St. Paul, etc., R. Co.*, 45 Minn. 510; 48 N. W. Rep. 334.

Section 5 of an act of North Carolina, incorporating the North Carolina Railroad Company, provided that all real estate held by said company for right of way, stations and workshops should be exempt from taxation until the dividends or profits should exceed six per cent per annum. Held, that the exemption provided by section 5 was a part of the contract between the state and the corporation, and that acts of the general assembly of such state repealing such section, and providing for the listing of such property for taxation, were void, as impairing the obligations of a contract. *Barnes v. Kornegay*, 62 Fed. Rep. 671.

A provision of the charter of the Michigan Southern Railroad Company, which provided for the payment of a percentage on the amount of its capital stock in lieu of all other taxes, is a special privilege, and cannot be extended to lines organized under the General Railroad Law, which are leased by it. *Lake Shore & M. S. R. Co. v. Grand Rapids*, (Mich.) 60 N. W. Rep. 767.

2. Modes of assessment and valuation generally.— The assessment for taxation of part of a railroad within a state, another part of which is in another state, no special circumstances existing to distinguish between the conditions in the two states, by ascertaining the value of the whole line as a single property, and then determining the value of that within the state, is not a valuation of property out of the state. It is not necessary, in order to keep within state jurisdiction, to treat the part of the road within the state as an independent line, and place upon it only its value if operated separately. 33 N. E. Rep. 421; 133 Ind. 513; *affd.*, Cleveland, C., C. & St. L. R. Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. Rep. 1122, HARLAN and BROWN, JJ., dissenting. The assessment for taxation of a certain number of miles of railroad within a state, forming part of a line of road running into another state, at their actual cash value, determined on a mileage basis, does not place a burden on interstate commerce, beyond the power of the state, simply because the value of the railroad as a whole is created partly by its interstate commerce. *Ibid.*

Revised Statutes of Connecticut, 1875, title 12, chapter 5, section 7, as amended in 1876, which provides that when only part of a railroad lies in the state it shall pay taxes on such proportion of the valuation of its capital stock, funded and floating debt, and bonds as the length of its road lying in the state bears to the entire length of the road, is not unconstitutional as laying a tax on interstate commerce. *State v. New York, N. H. & H. R. Co.*, 60 Conn. 326; 22 Atl. Rep. 765.

Where the equipment of a domestic railroad corporation is used interchangeably upon its lines within and without the state, its capital stock can only be taxed in the proportion that the number of miles operated and equipped in one state bears to the entire mileage. *Commonwealth v. Delaware, L. & W. R. Co.*, 145 Penn. St. 96; 22 Atl. Rep. 157. Where a part of the capital stock of a domestic corporation represents the value of a leasehold interest in a railroad entirely without the state, the amount thereof should be deducted in computing the valuation of the capital stock as a basis for taxation. *Ibid.*

A state statute distributing for purposes of taxation the rolling stock and personal property of railroad companies among the several counties traversed by the road, and subjecting it to the varying rates of taxation prevailing therein, instead of taxing it in the county of its principal office, as is done in the case of individuals and other corporations, is not a discrimination in violation of the fourteenth amendment to the Constitution of the United States. *Columbus Southern R. Co. v. Wright*, 151 U. S. 470; 14 Sup. Ct. Rep. 396. This affirms the decision of the Supreme Court of Georgia, reported in 89 Ga. 574; 15 S. E. Rep. 293, in which the syllabus prepared by the court is as follows:

1. As respects railroad companies having no exemption, a statute is not unconstitutional which provides for taxing railroad property for county purposes at the regular rate ad valorem which is levied by the county authorities on other property, each county through which a road runs being allowed to tax at that rate all the company's property, real and personal, located in that county, and in addition thereto its due proportion of the rolling stock and other floating or unlocated property of the company, that is, a proportion corresponding to the ratio between the company's property, real and personal, located in the given county, and the aggregate of its located property in all

the counties through which the road runs. Properly construed, this is the scheme and purpose of the act of October 16, 1889, on the subject of taxing railroad property for county purposes. The act is a general, not a special law, and, except as necessarily checked and qualified by irrevocable exemptions previously granted, it is uniform, equal and just. It is not wanting in uniformity because it recognizes and seeks to abide by inviolable charter rights of such railroads (if any) as can be taxed for county purposes only upon the basis of their net income, there being in fact, under existing conditions, no such railroads now in the state; nor because it requires rolling stock and other floating personalty to be apportioned for county taxation among the several counties through which the respective railroads run; nor because it requires returns to be made to the comptroller-general of the state instead of to the tax receivers of the several counties, and designates that officer, and not the tax officers of the counties, to calculate the amount of taxes due to each county according to the returns, and to issue execution therefor. The nature of railroad property, and its involved relations with the several counties interested, render the services of an officer common to all the counties appropriate for securing a correct and effective performance of these ministerial functions.

2. The act in question neither imposes a state tax for county purposes, nor attempts to levy county taxes directly by the state. It provides for taxing railroads for county purposes by and through the action of the county authorities, the rate in each county being fixed by such authorities, and being the same for all kinds of property. That different counties fix different rates is of no consequence, one and the same rate only being applied to property located in a given county.

3. The state does not by this act deny to any person or railroad corporation the equal protection of its laws, and consequently there is no conflict with the fourteenth amendment of the Constitution of the United States.

Mansfield's Arkansas Digest (§§ 5647 et seq.) provides that the governor, secretary of state and auditor shall constitute a board of railroad commissioners; that all railroads doing business in the state shall make and file with the secretary of state a schedule showing the miles of track used by them, and the value of all their improvements, station houses, railroad track, etc., on their right of way; that, for the purpose of taxation, all such property shall be classed as real estate, and shall be assessed annually; that the board of commissioners shall appraise the railroad track, etc., and certify to the assessor of each county the value of that portion lying in the county, and the assessor shall list and assess the same. Held that, under the Constitution of Arkansas of 1874 (Art. 16, § 5) providing that the value of property assessed for taxation shall be ascertained in such manner as the general assembly shall direct, but shall be equal and uniform throughout the state, such statute is not unconstitutional on the ground that it employs a different instrumentality for the assessment of railroad property from that employed to assess other property. *St. Louis, L. M. & S. R. Co. v. Worthen*, 52 Ark. 529; 13 S. W. Rep. 254. It is competent for the legislature to provide that such property shall be assessed annually, while ordinary real estate is assessed but once in two years; the fact that it is denominated "real estate" not changing its true character. *Ibid.*

Railroad property situated in South Carolina was assessed by the state board of equalization for railroads at eighty per cent of its real value, under a provision (Gen. St. § 219) that all property should "be valued for taxation at its true value in money," while all other property in the state was assessed by county boards of assessment at from fifty to sixty per cent of the real value. Held, in view of the general mode of assessing property for taxation in the state, upon application of a receiver for instructions, that there was no such evidence of an intention on the part of the board of equalization to violate the constitutional provision (Art. 9, § 1) in relation to equality of taxation, and a design to put the burden of tax alone on railroads, as would warrant the interference of the court. *Chamberlain v. Walter*, 60 Fed. Rep. 788. The Constitution of South Carolina directs all lands to be assessed every five years, and requires a uniform and equal rate of assessment and taxation; but, in practice, all railroad property, including the land forming part thereof, is assessed annually. Held, that a railroad is to be regarded as a unit, of which the land forms a part, and, therefore, that the annual valuation worked no such discrimination against railroads as would constitute a denial of the equal protection of the laws. *Ibid.*

3. Taxation of rolling stock used in interstate commerce.—Section 8, article 1, of the Federal Constitution, which confers power upon congress to regulate commerce among the several states, does not inhibit the taxation by a state of railway cars found within its borders, though in the transaction of business they pass into adjoining states and territories. *Denver & R. G. R. Co. v. Church*, 17 Col. 1; 28 Pac. Rep. 468. A domestic railway corporation, using and operating cars, may be required to pay the taxes thereon, though the exclusive ownership be in a foreign corporation, with its domicile, principal office and principal place of business in another state. *Ibid.*

It is within the power of a state to tax sleeping cars and other rolling stock of a foreign corporation, employed in interstate commerce, in the ratio which the number of miles of line within the state bears to the total number of miles of the whole line, as is done by the Louisiana statute (Acts 1890, No. 106, § 29). 55 Fed. Rep. 206, affirmed. *Board of Assessors v. Pullman's Palace Car Co.*, 8 C. C. A. 490; 60 Fed. Rep. 37.

4. Taxation of gross earnings — interstate road.—The Corporation Tax Law of Vermont imposing a tax upon the entire gross earnings of all railways operated in the state, and providing that if a railway be situated partly within and partly without the state the tax shall be proportionate to the mileage of trains run within the state, is unconstitutional, as an interference with interstate commerce. *Vermont C. R. Co. v. Vermont Central R. Co.*, 63 Vt. 1; 21 Atl. Rep. 262, 731.

5. Validity of tax or fee exacted according to mileage — Ohio law.—The act of April 15, 1889, of Ohio, requiring "every corporation or company operating a railroad or any part of a railroad within this state," to pay to the commissioner of railroads and telegraphs a "fee" of one dollar per mile for each mile of track operated by it within this state, contravenes sections 2 and 5 of article 12 of the Constitution of this state, which require taxes to be levied by a uniform rule upon all real and personal property according to its true value in money. *Pittsburgh, C. & St. L. R. Co. v. State*, 49 Ohio St. 189; 80 N. E. Rep. 435.

6. What included in "railroad track"—Illinois statutes.— Under the Revised Statutes of Illinois, chapter 120, section 42, which defines the "railroad track," which must be assessed by the state board of equalization, as the "right of way, including the superstructure of main, side and second track and turnouts, and the station and improvements of the railroad company on such right of way," city lots which have been bought by a railroad company with the intention of using them as a site for its station, when it should acquire title to other adjoining lots, but which it has held for four or five years without attempting to acquire title to such other lots, form no part of its "railroad track." *Chicago, B. & Q. R. Co. v. People*, 186 Ill. 660; 27 N. E. Rep. 260.

7. Enforcing collection—discrimination against railroads—penalties.— In the absence of any statutory provision for compelling railroad companies to pay their state taxes, such taxes may be collected by an action brought by the state. *State v. New York, N. H. & H. R. Co.*, 60 Conn. 826; 22 Atl. Rep. 765.

Under the Constitution of Georgia, which requires taxes to be levied and collected under general laws, the legislature has no power to impose a pecuniary penalty for nonpayment upon the railroads exclusively, leaving all other classes exempt from any penalty whatever. *Atlanta & F. R. Co. v. Wright*, 87 Ga. 487; 13 S. E. Rep. 578. Nor can the legislature subject railroads to execution for taxes on the first of October when the great mass of the taxpayers are exempt until the twentieth of December. *Ibid.*

Terminal property of a railroad company consisting of a freight house, roadbed and right of way, cannot be sold, under the provisions of a city charter, for nonpayment of assessments thereon for local improvements. *Lake Shore & M. S. R. Co. v. Grand Rapids*, (Mich.) 60 N. E. Rep. 767.

PEOPLE ex rel. CITY OF DENVER V. UNION PAC. RY. CO.

SAME V. UNION PAC., D. & G. RY. CO.

SAME V. BURLINGTON & C. RY. CO.

SAME V. DENVER & R. G. RY. CO.

(Supreme Court of Colorado, June 18, 1894.)

1. RAILROAD COMPANIES MAY BE COMPELLED TO CONSTRUCT BRIDGES OVER THEIR TRACKS AT STREET CROSSINGS. The legislature may authorize a city to compel a railway company which has laid its tracks across a street, to bridge the tracks at its own expense and according to plans prepared by the city, provided a reasonable necessity therefor is shown to exist.

2. FACTS HELD TO SHOW A REASONABLE NECESSITY THEREFOR. A petition for mandamus to compel railway companies to bridge their tracks across a street sufficiently shows the necessity for the bridge when it appears therefrom that the street at the point to be bridged is crossed by twenty-two tracks;

that trains are "continually" crossing over them; that the point is in a populous part of the city, and that the street is one of only four connecting a part of the city having a population of 20,000 with another part having a population of 80,000, and the plat filed with the petition shows that the nearest of the other three streets is several blocks away.

3. STREET UNDER BRIDGE NEED NOT BE DISCONTINUED. In order to compel railroad companies to bridge a street over their tracks, it is not necessary that the part of the street bridged should be abandoned to the use of the companies when by so doing extended territory would be rendered inaccessible.

MANDAMUS to compel certain railroad corporations to construct a viaduct over their tracks on Nineteenth street, in the city of Denver. In the District Court the proceedings were dismissed for insufficiency of the petitions. Petitioner brings error. Concurrent actions were brought by the city against each railroad company having tracks intersecting or extending along Nineteenth street, in the city of Denver. The facts are identical in each case, and in this court the actions were consolidated, under No. 2,884, for the purpose of argument and determination. The actions were all brought to enforce the provisions of an ordinance of the city of Denver, which is set forth at length in the margin.*

* "Section 1. Whereas, the construction and operation of a great number of railroad tracks that intersect and extend along Nineteenth street, in the city of Denver, has and does impede travel upon said street to a great extent, and has made the said Nineteenth street dangerous for public travel thereon as a highway:

"Sec. 2. Therefore, all railroad companies, the tracks of which intersect or extend along Nineteenth street, in the city of Denver, are hereby required to construct, at their own expense, a good and sufficient viaduct, of the width of fifty feet, over and across their said tracks, at a height of twenty-two feet in the clear above such tracks. Where the distance between any two of said railroad tracks is not sufficient to permit an approach to the viaduct over each track from the ground, to be made at a grade of not to exceed seven per cent, then the railroad company owning each of such tracks shall build such viaduct at said height to a point midway between said tracks, and in such manner as to make the same one continuous viaduct over such tracks. They are also hereby required to construct, at their own expense, good and sufficient approaches to such viaduct or viaducts, at a grade of not to exceed seven per cent, and such railroad companies, their successors and assigns, shall thereafter, at their own expense, keep and maintain said viaduct or viaducts and the approaches thereto in a good state of repair. Said viaduct or viaducts to be constructed entirely of iron or steel crossbeams and supports set on substantial stone foundations; the longitudinal joists between such crossbeams to be of iron, steel or wood, and the floor to be of wood. Such viaduct or viaducts, and the approaches thereto, shall be set in said Nineteenth street so as to leave

Authority to pass the foregoing ordinance is claimed under the following provisions of the charter of the city of Denver, to be found on page 127 of the Acts of 1889 :

"The city council shall have power by ordinance: * * *
 Sec. 46. To regulate the use of locomotive engines, to direct and control the location of cable and other railroad tracks, and to require railroad companies to construct, at their own expense, such bridges and their approaches, tunnels, or other conveniences at public crossings, and such viaducts and their approaches over their tracks, where the same cross or extend along public highways or streets, and to put such streets in such condition and state of repair, as not to interfere with the free and proper use of such street or crossing, as the city council may deem necessary, and, where viaduct or viaducts cross the tracks of several railroad companies, to compel them to build their proportion of a continuous

an equal distance of said street unoccupied on each side of the same. The said viaduct or viaducts to be constructed with a roadway thirty-eight feet in width for vehicles, and with sidewalks six feet in width upon each side of such roadway for foot passengers. The said approaches shall be constructed of good and substantial stone abutments and stone and earth approaches, or said approaches may be constructed of the same material as the said viaduct, or partly of each. The width of said approaches to be thirty-eight feet in the clear from the street until the same reaches a height of at least twelve feet above the street, and for that distance the approaches shall be used only as a roadway, and from that point until they meet the viaduct the approaches shall be of the same width as the viaduct, with the roadway and sidewalks to conform thereto. At the point on said approaches where the sidewalks begin, there shall be constructed stairways of iron or wood leading to the sidewalk below on Nineteenth street. Said viaduct or viaducts and approaches, on the outside thereof, shall have good and substantial iron or steel railings.

"Sec. 3. The work of constructing said viaduct or viaducts and approaches thereto shall be commenced, in good faith, within sixty days after the passage of this ordinance, and shall be actively continued thereafter until said viaduct or viaducts be completed and ready for travel, which shall not be later than six months after the passage of the said ordinance.

"Sec. 4. Upon the completion of such viaduct or viaducts and approaches, the railroad companies whose tracks run under the same shall not be required to keep either flagman or gateman at the crossings of their tracks with said Nineteenth street.

"Sec. 5. Upon the completion of such viaduct or viaducts, any of the railroad companies aiding in the construction of such viaduct or viaducts shall have the privilege of constructing across said Nineteenth street, under said viaduct or viaducts, such new railroad tracks as may be necessary, without any special permission of the city council first had and obtained."

viaduct or viaducts over said tracks with their approaches, and to regulate the rates of speed of all railroad trains within the city limits, and their stops at street crossings."

J. F. Shafroth, F. A. Williams and A. B. Seaman, for plaintiff in error. *Teller & Orahood and Walcott & Vaile*, for defendants in error.

HAYT, Ch. J. (*after stating the facts*). The duty of railroad and other companies crossing highways to relieve the danger and inconvenience of such crossings has been long recognized under the common law. In *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131; 28 N. W. Rep. 3, this rule is stated as follows: "The common-law rule is that, where a person or corporation is given the right to build a railroad or make a canal across a public highway, this gives them no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway at their own expense, by some reasonably safe and convenient means of passage, although the statute contains no express provision to that effect. This duty includes the doing of whatever is necessary to be done to restore the highway to such condition; as, for instance, in case of a bridge, the approaches or lateral embankments, without which the bridge itself would be useless. This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and, therefore, they, and not the public, should be burdened with its expense." The following cases are cited in support of the foregoing rule: *King v. Inhabitants of Lindsay*, 14 East, 317; *King v. Kerrison*, 3 Maule & S. 526; *Leopard v. Canal Co.*, 1 Gill, 222; *Northern Cent. Ry. Co. v. Mayor, etc., of Baltimore*, 46 Md. 425; *Eyler v. Commissioners*, 49 Md. 257; *In re Trenton Water-Power Co.*, 20 N. J. Law, 659; *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Queen v. Inhabitants of the Isle of Ely*, 15 Q. B. 827; *Paducah, etc., R. Co. v. Com.*, 80 Ky. 147. The statute and ordinance relied upon in support of the present actions are evidently not for the purpose of curtailing the duty imposed by the common law, but rather for the purpose of making the duty explicit and free from doubt. Although it may have been optional with the railroad companies in the first instance to have laid their tracks at the street grade, or above or below

such grade, the duty to leave the public a reasonably safe and free passage was the same in each instance; and there can be no doubt that the duty is a continuing one, and that the legislature has ample power and authority to require such changes from time to time as the public safety or convenience may reasonably require. A railroad with a single track crossing at grade may inconvenience the public but little, while by increasing the number of tracks and trains, to meet the requirements of a growing population and enlarged traffic, the inconvenience and hazard may be increased to such an extent as to practically deprive the public of any beneficial use of the street. In the case of *Com. v. New Bedford Bridge*, 2 Gray, 339, it was held, under an act of the legislature authorizing the erection of a bridge over a navigable river, "with two suitable draws, which should be at least thirty feet wide," that the duty of the corporation was not discharged by making the draws thirty feet in width, this being adequate for the accommodation of commerce by the vessels in use at the time the bridge was constructed, but that the duty was a continuing one, requiring the corporation to enlarge the draws from time to time, as the same should become necessary, by reason of the larger size or change in model of vessels navigating the river. Likewise, in *Cooke v. Railroad Co.*, 133 Mass. 185, it was held, in an action for personal injuries resulting from an insufficient bridge maintained over its tracks by the railroad company, that it was bound to provide a bridge suitable for the increased travel, and that even if the bridge was adequate for the purpose when built, and an increased use rendered it inadequate, the corporation must alter the bridge. The authorities are believed to be uniform to the effect that, when railroad companies lay their tracks across public streets, such occupation of the street is subject to the condition that they will do whatever a reasonable public necessity may require to maintain the street as a highway, and that this duty is a continuing one, enlarging from time to time, as changed conditions render the mode adopted inadequate. *Com. v. New Bedford Bridge*, supra; *Maltby v. Railway Co.*, 52 Mich. 108; 17 N. W. Rep. 717; *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131; 28 N. W. Rep. 3; 38 Minn. 246; 36 N. W. Rep. 870; *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219; 39 N. W. Rep. 153.

The foregoing principles are conceded by counsel in this case, but it is argued that the petitions do not show a reasonable public necessity for the proposed viaduct. This contention is not borne out by the record. From this it appears that Nineteenth street is intersected by twenty-two tracks that would be spanned by the proposed viaduct; that trains are "continually" passing over these tracks at all hours of the day and night; "that the said Nineteenth street, between said Wazee and Central streets, is situated in a populous part of the city of Denver, and is one of the most important thoroughfares connecting North Denver, which has a population of some twenty thousand people, with what is known as East Denver, having a population of about eighty thousand people; that only four streets connect said North Denver with said East Denver; that, in addition to the tracks of defendants, which extend across said Nineteenth street, there are also a large number of tracks which have been constructed across said Nineteenth street by divers other railroad companies, against whom proceedings in mandamus are concurrently brought herewith to compel the performance of the same duty; that, ever since the year 1889, the passing of said trains on the various railroad tracks crossing the said part of Nineteenth street became so constant that it interfered with and impeded to such an extent the public travel on said Nineteenth street that, in order to restore said highway to a reasonably safe and passable condition, it became necessary that a viaduct should be constructed over and across said tracks in Nineteenth street, together with suitable and convenient methods of approach to the same; * * * that the defendants and other railroad companies, though said necessity for said viaduct still exists, and the same is necessary for the safety of the public in the use of the said Nineteenth street, have refused and neglected to begin the construction of the same; * * * that without said viaduct said Nineteenth street, at said crossings, is unsafe for public travel and public use, by reason of said railroad tracks crossing the same, and by reason of the constant running and operation of engines, cars and trains over and across the same by defendant." It would seem that the necessity for the proposed viaduct is made plain by the foregoing averments, but counsel base an argument upon the allegation to be found in the petition that only four streets connect North Denver

with East Denver. The claim is that the petition should have shown that the other three streets could not be conveniently utilized for the accommodation of the public in passing between the two sections of the city named. We do not think this claim is well founded, particularly in view of the fact that it appears from the plat which is filed as a part of the petition that of the other three streets the one nearest Nineteenth street is several blocks away from that thoroughfare.

The only other ground relied upon by the defendants to overthrow the application of the petitioner for a writ of mandamus is stated as follows: "That it appears from the petition herein, and from the ordinance therein set forth, that it is proposed by the petitioner to continue and maintain Nineteenth street at a grade as a public thoroughfare across the tracks of these defendants, and at the same time to compel these defendants to construct a new and different thoroughfare over and across the tracks of these defendants without compensation therefor." The argument in support of this objection is founded upon the principle that, if a burden is to be imposed, it must be imposed in such a manner as not to inflict upon the defendants unnecessary costs and expenses; and to this end it is urged that, as a condition precedent to the right of the city to compel the erection of a viaduct over the railroad tracks, a new grade for Nineteenth street must be established above, corresponding with the grade of the proposed viaduct, and the street below entirely given over to the use of the defendants, or vacated. We think the argument unsound when applied to the case as now presented. It is apparent from the plat, which is made a part of the petition and relied upon by counsel representing all parties, that to entirely vacate Nineteenth street at the surface would be to deprive a large number of people and an extended territory from access by teams to either East or North Denver, while, by the ordinance enacted, care has been taken to provide for the accommodation of the public in such a manner as to inconvenience the least possible number of people, and at the same time to make the burden of constructing the viaduct as light as possible. The cost of a viaduct the full width of the street would certainly be much more than one of the width required by this ordinance. In *State v. St.*

Paul, M. & M. Ry. Co., *supra*, the action was brought at the relation of the city of Minneapolis, to compel the defendants to build certain bridges over their tracks and approaches to the same. One of the defendants objected to the plan proposed by the city, and in lieu thereof, proposed another and different plan, which it was willing to accept; but, the court being of the opinion that the plan proposed by the relator was suitable, appropriate and adequate for the purpose, the writ of mandamus was ordered accordingly. In that case the plan included a bridge over contiguous tracks of two railway companies, and it was apparent that they could not agree upon a plan. In this case there are four defendants, and, if it were left to them to determine the character of the structure to be erected, it is not at all probable that any plan would meet with the approval of all. Hence the advisability of having a plan prepared by the city in the first instance; and, in case the plan proposed is feasible and adequate for the purpose, the erection of the viaduct in accordance therewith may be enforced, provided a reasonable necessity therefor is shown to exist. What we have hereinbefore said is predicated entirely upon the allegations of the petitions and their sufficiency. Upon these we conclude, upon principle and authority, that the petitions are sufficient in form and substance; hence, the motion to quash should have been overruled, and the defendants required to answer. It is not for us to anticipate the character of the answers that may be interposed. When the case is fully presented, by proper pleadings and proofs, it will be for the trial court, upon the facts and circumstances as they then appear, and the law applicable thereto, to determine whether or not the city is entitled to the relief sought by these actions. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.*

Compelling railroad companies to remove grade crossings at their own expense.—The power of a state to compel railroad companies to remove dangerous grade crossings, and to bear the whole or any part of the expense, would seem to be settled by the decision in *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556; 9 Am. R. R. & Corp. Rep. 593. In the case of *In re Selectmen of Norwood*, 161 Mass. 259; 37 N. E. Rep. 199, it was held that the Laws of Massachusetts, 1890, chapter 428, providing for the abolition of grade

* Reported in 37 Pac. Rep. 610.

crossings, and requiring the cost of changes made to be paid by the town, the railroad company and the state, in proportions fixed, without reference to the value of the property owned by them, or the benefits which they severally receive, is a valid exercise of legislative power. The court says: "The validity of this statute does not depend upon the right of the legislature to levy taxes. It was enacted rather in the exercise of the power of the legislature to enact all needful laws to prevent accidents, and to provide as well for the convenience as the safety of the public while traveling on highways across railroads, or while being transported in the cars of the railroad companies. It would have been in the power of the legislature, in granting charters to railroad corporations, to provide that the railroad should not be constructed across a public highway without carrying the highway over or under the railroad, and that all the expenses of changing the grade of the way, and constructing the approaches to the railroad, should be borne by the railroad corporation. If, by an increase in the amount of travel at a grade crossing, or of the number of trains running over the railroad, or changes in the manner of running trains, or of the modes of travel on a highway, or if for any other reason, it should seem to the legislature best for the public interest that a grade crossing should be abolished, it would be within the constitutional authority of the legislature to forbid the continuance of it, and to require the railroad company to pay the whole, or any part, of the cost of making the change. *City of Roxbury v. Boston & P. R. Corp.*, 6 Cush. 424; *Com. v. Eastern R. Co.*, 108 Mass. 254; *Worcester v. Norwich & W. R. Co.*, 109 Mass. 103; *In re City of Northampton*, 158 Mass. 299; 83 N. E. Rep. 568; *Railroad Co. v. Town of Bristol*, 14 Sup. Ct. Rep. 437; *Appeal of New York & N. E. R. Co.*, 58 Conn. 532; 20 Atl. Rep. 670; *Appeal of New York & N. E. R. Co.*, 62 Conn. 527; 26 Atl. Rep. 122; *Boston & M. R. Co. v. County Comrs.*, 79 Maine, 886; 10 Atl. Rep. 118; *State v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 144. This it might do, in the exercise of the police power, for the protection of the people; and its decision in regard to what is right and proper in each particular case, or in any class of cases, would not be subject to revision by any other tribunal. This would not be taking from the railroad company its property, or any vested right. It would be merely prescribing, in the interest of the public, the mode of constructing its road. Of the power to prescribe such regulations for railroad corporations, there can be no doubt. These corporations are creatures of the state, engaged in doing a public business, and are bound by any reasonable statutes for the regulation of this business which the legislature chooses to enact. *Attorney-General v. Boston & A. R. Co.*, 160 Mass. 62; 35 N. E. Rep. 252; *Parker v. Railroad Co.*, 109 Mass. 506; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468; *Railroad Co. v. Smith*, 128 U. S. 174-179; 9 Sup. Ct. Rep. 47. * * *

If the statute arbitrarily put upon railroads the expense, or part of the expense, of general improvements in the system of highways of a city or town, not fairly incidental to the changes in the crossing at the railroad, it would be beyond the power of the legislature to enact. The railroad can properly be charged with expenses incurred in adapting the public ways and the railroads to each other in such a manner as best to promote the safety and convenience of all the people. To do this may, in particular cases, involve

changes extending a considerable distance from the railroad. Whether such a change is within the power of the legislature to make at the expense of the railroad company is to be determined by the requirements of public convenience and necessity, having reference to the interests of the railroad company, as well as those of all the people who have occasion to cross the railroad. Whatever is incidental to a reasonable change in the mode of crossing may be included in the work for which the corporation may be charged under the statute. This may include, not only a change in an existing crossing, which does not destroy the identity of the crossing, but also the abolition of the crossing, and the substitution of another for it on a new way, if the substitution provides no more than a fair equivalent for that which is given up. *Davis v. Commissioners*, 153 Mass. 218; 26 N. E. Rep. 848. The fact that, in making the changes in this case, some of the new ways and approaches to the crossing are to be wrought to a greater width than the old ones, and to be of a superior construction, is not, under the findings, a good ground of objection to the proceedings of the commissioners. The work involved in the changes should be done in a proper manner." See, also, *State v. City of Camden*, 58 N. J. L. 322; 21 Atl. Rep. 565

BRASS V. STATE OF NORTH DAKOTA EX REL. STOESER.

(Supreme Court of the United States, May 14, 1894.)

CONSTITUTIONAL LAW. REGULATING CHARGES OF GRAIN ELEVATORS. The Laws of North Dakota, 1891, chapter 126, declaring all buildings, elevators or warehouses in the state erected and operated "for the purpose of buying, selling, storing, shipping or handling grain for profit," public warehouses, and prescribing maximum rates of charges for storing and handling grain therein, is within the legitimate sphere of legislative power, and does not amount to a regulation of commerce among the states, or involve any deprivation of property without due process of law, or denial of the equal protection of the laws, even in its application to an elevator owner, whose principal business is storing his own grain, the storage of grain for others being a mere incident, and even though it provides that the grain is to be kept insured at the expense of the warehouseman.

NORMAN BRASS, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the state of North Dakota. The defendant in error, Louis W. Stoesser, owns a farm adjoining the village, on which, in the year 1891, he raised about 4,000 bushels of wheat. On September 30, 1891, Stoesser applied to store a part of his wheat crop for the compensation fixed by section 11 of chapter 126 of the Laws of North Dakota for the year 1891, which Brass refused to do unless paid

therefor at a rate in excess of that fixed by the statute. On this refusal, Stoesser filed in the District Court of Ramsey county, N. D., a petition for an alternative writ of mandamus. The District Court granted an alternative writ of mandamus, as follows:

“The state of North Dakota to Norman Brass, respondent: Whereas, the following facts have been made to appear to this court by the verified petition of the above-named relator, to wit: (1) That he is the relator in the above-entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and state aforesaid, and during the year 1891 has raised on said farm about 4,000 bushels of grain, principally wheat. (2) That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity. (3) That fully fifty per cent of the grain raised in said Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages and railroad stations in said Ramsey county. (4) That the respondent, Norman Brass, is now and at all the time herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing and shipping grain for profit. (5) That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor aforesaid, and tendered the same at said elevator of said Norman Brass for storage, and requested said Norman Brass to receive, elevate, insure and store said grain for twenty days, and at the time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring and storing said grain for twenty days; that said grain, when so tendered as aforesaid, was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied. (6) That said Brass then and there refused to receive said grain for the purpose aforesaid, and wholly refused to store said grain at said price. (7) That the relator endeavored to secure storage for said grain at the

only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said elevator refused to receive relator's grain, upon the same ground as respondent. (8) That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor aforesaid refused to receive grain for storage at said price: Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoesser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be tendered you by the relator in a dry and suitable condition for storage, at a rate of compensation not exceeding the following schedule, viz., for receiving, elevating, insuring, delivering and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months — or that you show cause to the contrary before this court, at the court house in the city of Devil's Lake, Ramsey county, North Dakota, on the 5th day of October, 1891, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard. And how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ.

"Dated Sept. 30th, 1891."

To which writ appellant made return, by answer, as follows:

"The return of the respondent to the alternative writ of mandamus issued in the above-entitled proceeding shows to the court:

"(1) That the respondent admits the truth of the facts pleaded in said alternative writ.

"(2) For a further return to the said alternative writ, the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of the Great Northern railroad, containing a population of less than one hundred people; that there are two other elevators owned and operated by different owners, independently of, and in competition with, each other; that there are about six hundred grain elevators, flathouses

and warehouses in said state of North Dakota, at which grain is bought and shipped for profit, which said elevators, warehouses and flathouses are owned and operated by over one hundred and twenty-five different owners, independent of, and in competition with, each other; that the owners of said elevators, warehouses and flathouses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations and individual farmers; that said elevators, flathouses and warehouses vary in cost of construction from five hundred dollars to five thousand dollars, and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses and flathouses operated and owned each by different owners and operators at every station in North Dakota at which grain is marketed; that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area, and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost, when constructed and fully equipped, about three thousand dollars; that the capacity of the same is about 30,000 bushels.

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to, and selling it at, Minneapolis and Duluth, Minnesota, to which business that of storing grain for third persons has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at, and is shipped to and sold at, Minneapolis and Duluth, Minnesota.

"That respondent, in the conduct of his said business, contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons, at a future and fixed date, certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contract.

"That in seasons when the grain yield is light, and railroad facilities are such as to enable grain to be moved rapidly, there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other

times, when the yield is enormous, as in the present year, respondent's contracts are large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That there are located in Minneapolis and Duluth, Minnesota, a great many corporations, persons and copartnerships engaged in a business known as the 'grain commission' business.

"That those grain commission houses have swarms of agents traveling throughout the state of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances, and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minnesota, to be by the latter sold on commission.

"That none of said grain commission houses have or own any storage capacity in North Dakota.

"That if chapter 126 of the Laws of 1891 is valid, and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of the respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated, for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business, and respondent subjected to suits for damages for nonfulfillment of his said contracts.

"That the relator only offered to pay respondent for the service which he requested him to perform the rate fixed by chapter 126 of the Laws of 1891, that is, two cents per bushel; that respondent refused to perform the service for less than two and one-half cents per bushel.

"That respondent refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies

to him the equal protection of the laws, and amounts to a regulation of commerce among the states.

“That for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flathouses and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering and fifteen days’ storage, two and one-half cents per bushel; after the first fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents per bushel for six months.

“That the average farm in North Dakota does not exceed in area 160 acres; that the average yield in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars.

“That the business of respondent, and all other persons, firms and corporations engaged in the business of operating grain elevators, warehouses and flathouses in North Dakota and the manner in which said business is conducted is not in any manner unwholesome or deleterious to the health, morals, welfare or safety of the community or society.

“That the railroad and warehouse commissioners of North Dakota, on page 33 of their annual report to the governor for 1890, said: ‘In view of the fact that, after thorough investigation, the board deem the charges allowed by section 22, chapter 187 (Laws 1890), and also section 10 of said chapter, as unreasonable, the following rules of storage are recommended: (1) For receiving, elevating, insuring, delivering and fifteen days’ storage, two and one-half cents per bushel; (2) after fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months.’

“That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board.

“That the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what

he shall charge for the use of his said elevator, or the bins therein.

“That since the enactment of section 9 of chapter 126 of the Laws of 1885 the amount of grain shipped directly by farmers without the intervention of elevators, warehouses or flathouses has been increasing, and in 1890, as respondent is informed and believes, nearly fifty per cent of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minn., by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year.

“That pursuant to section 7, chapter 122, Laws 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said state of North Dakota, to wit:

“‘State of North Dakota. Office of Commissioners of Railroads.

“‘Rules for the distribution of cars between stations and shippers:

“‘(1) In distributing cars to stations for grain loading, they shall be distributed according to the daily average shipments from such stations.

“‘(2) In distributing cars to shippers for grain loading at stations, agents shall first fill each shipper’s order for one car to each. After this is done the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper.

“‘(3) Parties desiring to load grain on track shall be furnished cars, and shall be allowed for loading time twenty-four hours from the time the car is set on the side track to complete loading, and furnish shipping directions. In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then, in such case, the railway company may collect upon such cars \$3.00 rental for each and every day or part of a day which such cars are delayed after twenty-four hours.

“‘The above rule as to time and rental charges shall also apply to grain delayed in unloading on track.’

“In connection with said rules in said report said commissioners said: ‘We believe that the railroads have labored faithfully to supply cars to shippers, in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have

been distributed in conformity therewith. From September 15th to December 15th the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year this has been the case, and cars have been supplied as soon as possible by the railroad companies.

“ ‘The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota.’

“ Wherefore, respondent demands judgment quashing the alternative writ of mandamus, dismissing this proceeding, and for his costs and disbursements laid out and expended in this action.”

To this return, Stoesser interposed a general demurrer, which was sustained; and, Brass electing in open court to stand on his return, a peremptory writ of mandamus was allowed. From this judgment an appeal was taken to the Supreme Court of North Dakota, which court affirmed the order and judgment of the District Court, and remitted the record to that court. On May 28, 1892, final judgment was entered in the District Court, making the judgment of the Supreme Court the judgment of the District Court, and awarding a peremptory writ of mandamus to execute that judgment. Whereupon, Brass sued out a writ of error to this court.

J. F. McGee, A. T. Britton and A. B. Browne, for plaintiff in error. *C. D. O'Brien and H. E. Paine*, for defendant in error.

SHIRAS, J. After stating the facts in the 13th article of the Constitution of the state of Illinois, adopted in 1870, all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, were declared to be public warehouses, and it was made the duty of the general assembly to pass all necessary laws to give full effect to that article of the Constitution. By an act approved April 25, 1871, and entitled “An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the Constitution of the state,” the legislature of Illinois provided that those who conducted such public ware-

houses located in cities containing not less than 100,000 inhabitants, should procure licenses and should give bond conditioned for compliance with the law, prescribed maximum rates for storing and handling grain, and declared certain penalties for the failure to procure licenses.

The validity of this law was upheld by the Supreme Court of Illinois *Munn v. People*, 69 Ill. 80. And that judgment was affirmed by this court. *Munn v. Illinois*, 94 U. S. 113.

In June, 1888, the legislature of the state of New York passed an act entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state," whereby maximum charges were fixed for elevating, receiving, weighing and discharging grain, when the business was carried on in a city containing 130,000 inhabitants or upwards, and penalties imposed for disregard of the provisions of the statute. The owner of an elevator in the city of Buffalo was indicted, found guilty and sentenced, in the Superior Court of Buffalo, for exacting charges for elevating grain in excess of the statutory rates. An appeal was taken to the Court of Appeals of the state of New York, which affirmed the judgment of the Superior Court of Buffalo. *People v. Budd*, 117 N. Y. 1; 22 N. E. Rep. 670, 682. A writ of error brought the case to this court, where the judgment of the Court of Appeals was affirmed. 143 U. S. 517; 12 Sup. Ct. Rep. 468.

The legislature of the state of North Dakota, by an act approved March 7, 1891, and entitled "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the 4th section thereof, that "all buildings, elevators or warehouses in this state, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation or trust, for the purpose of buying, selling, storing, shipping or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within

this state or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage or handling at such public warehouses, while the same are in operation." And in the 5th section: "That the proprietor, lessee or manager of any public warehouse or elevator in this state shall file with the railroad commissioners of the state a bond to the state of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of not less than \$5,000 nor more than \$75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the state in relation thereto." And in the 11th section thereof: "The charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner." And by the 12th section it is provided that: "Any person, firm or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the District Court of the second judicial district of the state of North Dakota, in proceedings, the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of the court was, on error, duly affirmed by the Supreme Court of the state. *State v. Brass*, (N. D.) 52 N. W. Rep. 408.

In the cases thus brought to this court from the states of Illinois and New York, we are asked to declare void statutes regulating the affairs of grain warehouses and elevators within

those states, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the 8th section of article 1 of the Constitution of the United States which confers upon congress power to regulate commerce with foreign nations and among the several states, and to the fourteenth amendment, which ordains that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid ; and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago, in the one case, and to the cities of Buffalo, New York and Brooklyn, in the other, while the North Dakota statute is applicable to the territory of the entire state.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace, in both cases, the entire state, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centers, where, on

account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota, and the small population of its country towns and villages, are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the lawmakers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of 100,000, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the eastern cities; that the great elevators used in transshipping grain from the lakes to the railroads are essential, and that those who own them, if uncontrolled by law, could extort such charges as they pleased. And great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural state, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have

no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that in the cases cited the judges who expressed the conclusions of the court entered, at some length, into a defense of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts on the part of judges to vindicate to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is, and always has been, a mere incident; and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors was designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense.

This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of mandamus, based his defense wholly upon grounds arising under the Constitution of the State and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws, or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly affirmed.

BREWER, J. (dissenting). I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on *Munn v. Illinois*, 94 U. S. 113, and *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said. It is a significant fact that in *Sinking-Fund* cases, 99 U. S. 700, 747, and in *Wabash, St. L. & P. Ry. Co. v. People of Illinois*, 118 U. S. 557, 569; 7 Sup. Ct. Rep. 4, Mr. Justice BRADLEY and Mr. Justice MILLER, who concurred in the judgment in *Munn v. Illinois*, each sought to limit and qualify the scope of the language used by the chief justice in that case. These are the words of Mr. Justice BRADLEY:

“The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or bur-

den upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

And this is the language of Mr. Justice MILLER, delivering the opinion of the court:

"And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

I desire, however, specially to notice the facts disclosed by this record, and to point out to what extent the decision of this court now goes. The case, coming from the Supreme Court of the state of North Dakota, must be determined upon the record as it is presented. Nothing can be added to or taken from the facts, as established by that record. The case was heard and determined upon a demurrer to the return made by the defendant to the petition and writ of mandamus; and of course, upon such demurrer, the facts stated in the return are to be taken as true. From that return it appears that along the line of the Great Northern railroad, in the state of North Dakota, there are about 600 grain elevators; that at Grand Harbor, a small way station on the line of that road, there are three elevators, one of them being that owned by the defendant; that defendant's elevator is a small one, with a capacity of 30,000 bushels, and costing about \$3,000. For aught that appears, the elevator was on the private property of the defendant, though contiguous to the railroad, and at the railroad station. It is further admitted:

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to, and selling it at, Minneapolis and Duluth, Minnesota, to which the business of storing grain for third persons is, and always has been, a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at, and is shipped to and sold at, Minneapolis and Duluth, Minnesota.

“That respondent, in the conduct of his said business, contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons, at a future and fixed date, certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contracts.

“That in seasons when the grain yield is light, and railroad facilities are such as to enable grain to be moved rapidly, there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times, when the yield is enormous, as in the present year, respondent's contracts large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by the respondent in the conduct of his said business.

“That if chapter 126 of the Laws of 1891 is valid, and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business, and respondent subjected to suits for damages for nonfulfillment of his said contracts.”

The rates which were established by law were as follows:

“(1) For receiving, elevating, insuring, delivering and fifteen days' storage, two and one-half cents per bushel.

“(2) After fifteen days, one-half cent per bushel for each fifteen days, or part thereof, but not to exceed five cents for six months.”

It appears from these admissions that the principal business of defendant was that of buying wheat, and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained

his elevator for the exclusive purpose of purchasing grain to fill his contracts; and while at the time the elevator was not full, and there was room for the storage of the grain tendered by the petitioner, and the defendant had at times used vacant space in his elevator for the storage of grain of others, yet such use was a mere incident to, and subordinate to, his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator.

Now, my first objection is that by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator. His business is that of buying and selling grain, and he operates and maintains the elevator, which he owns, for the exclusive purpose of carrying on that business. That he may have sometimes accommodated his neighbors by the use of his elevator for the storage of their grain, and thus, to a limited extent, engaged in that business, does not change the fact, as admitted, that his principal business was that of buying and selling, and that he operated and maintained that elevator exclusively for the carrying on of that business, or the other admitted fact, that, if he is compelled, as he is compelled by this mandate, to receive grain as tendered, so long as he has storage capacity unoccupied in his elevator, his principal business, and that for which he built the elevator, will be utterly ruined and destroyed.

The question is not whether, if he should receive and store in his elevator grain for others, he might not so far bring himself within the scope of the law as to be deemed, for that transaction, engaged in the business of maintaining a public elevator, and thus bound by the charges fixed by statute; but whether, when he maintains an elevator exclusively for his own business, the fact that at times he has used vacant room in it for the storage of the grain of other persons, compels him to receive grain when tendered, irrespective of the injury which it does to his own business. And it is admitted that at the time of this tender there was not sufficient storage capacity in his elevator to hold and store the grain purchased by him in the conduct of his business, and this is a matter of no trifling moment to one engaged in the business of buying and selling grain. He cannot know in advance

when grain will be tendered at a price which will justify his purchase with a view to profit. The fact that to-day there may be storage capacity does not prove that to-morrow he may not need the entire capacity of his elevator; and yet, if because to-day there is room in his elevator, he is bound to receive any grain that shall be tendered, he may to-morrow be unable to make purchase of the offered grain. It is a matter of common knowledge that grain is not put into and taken out of an elevator in an instant; and if once deposited the owner cannot be compelled to remove it, merely for the accommodation of the warehouseman, but may leave it there indefinitely, so long as he pays the legal charges. The petition was for a writ of mandamus commanding the defendant, "so long as the capacity of his said elevator is sufficient for the purpose, to store such grain as may be tendered to him by the relator," and the decree of the court was that the "writ issue as prayed for," and that is the decision which is affirmed by this court.

I dissent, in the second place, because the facts show, in the words of Mr. Justice BRADLEY, no "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community." Along the line of this single road, within the limits of this state, there are about 600 of these elevators, owned and operated by over 125 different persons, varying in cost of construction from \$500 to \$5,000. At every station there is land purchasable by any one at prices varying from \$1.25 to \$40 per acre, and a granary sufficient to store the average product of an ordinary Dakota farm can be erected at a cost of not exceeding \$150. So it is that when any farmer or other individual can, at a cost of less than \$200, provide himself with all the facilities for storing and shipping the entire product of an ordinary farm; when, along the line of a single railroad, there are 600 elevators already constructed, owned and operated by 125 different persons; when, at every station at which grain is marketed, there are from two to ten such elevators — it is held that there exists a monopoly such as justifies control by the public of the prices at which grain shall be stored in any one of these many elevators. If this be a monopoly, justifying public control of prices for service, I am at a loss to perceive at what point the fact of monopoly will cease, and freedom of busi-

ness commence; for, obviously, elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and, therefore, savoring no more of monopoly.

I dissent, in the third place, because by this law the elevator-man is bound, not merely to receive, store and discharge the grain which is tendered to him, but also to insure and pay the cost of insurance, it matters not what that cost may be, whether more or less than he receives for the whole service. I do not care to enlarge upon this matter. If the legislature can compel a party, though confessedly to the disadvantage, injury and even destruction of his own special business of buying and selling grain, to receive and store grain, for whoever may demand it, in an elevator which he is maintaining and operating for the exclusive carrying on of his own business, at any price which it sees fit to allow, and at the same time compel him to advance the money to insure the property thus forced upon him, I can only say that it seems to me that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost. For these reasons, thus briefly stated, I am constrained to dissent from this opinion and judgment.

I am authorized to say that Mr. Justice FIELD, Mr. Justice JACKSON and Mr. Justice WHITE concur in this dissent.*

Regulating the charges of grain elevators.—The principal case is an important supplement to that of *Budd v. New York*, reported in 5 Am. R. R. & Corp. Rep. 610, and *Munn v. Illinois*, 94 U. S. 113. On the regulation of railroad charges, see *Chicago, etc., R. R. Co. v. Minnesota*, 2 Am. R. R. & Corp. Rep. 564, and note; *Reagan v. Farmers' Loan & Trust Co.*, 9 Am. R. R. & Corp. Rep. 641, and note, and *Chicago, B. & Q. R. Co. v. Jones*, ante, p. 234.

As to the regulation of charges in other lines of business, see *Spring Valley Water Works v. San Francisco*, 1 Am. R. R. & Corp. Rep. 96; *Central Union Tel. Co. v. State*, 2 Am. R. R. & Corp. Rep. 406; 2 Am. R. R. & Corp. Rep. 586, note, § 2; 6 Am. R. R. & Corp. Rep. 189, note; *Commonwealth v. Covington & C. Bridge Co.*, 7 Am. R. R. & Corp. Rep. 638, and note; *Covington & Cinn. Bridge Co. v. Kentucky*, post.

* Reported in 153 U. S. 391; 14 Sup. Ct. Rep. 857.

COVINGTON & CINCINNATI BRIDGE Co. v. KENTUCKY.

(Supreme Court of United States, May 26, 1894.)

CONSTITUTIONAL LAW. POWER OF STATE TO REGULATE TOLLS ON BRIDGE BETWEEN STATES. INTERSTATE COMMERCE. A bridge was constructed across the Ohio river between the states of Ohio and Kentucky, by a company incorporated by the joint authority of both states, and authorized to collect certain tolls. The bridge was declared by congress to be a lawful structure. An act of the legislature of Kentucky subsequently undertook to fix and regulate the tolls which the company might charge. Held, that the act was invalid; that traffic across the river was interstate commerce and the bridge an instrument of such commerce, and that one state could not regulate the charges for transportation thereon without the consent of congress or of the other state. FULLER, Ch. J., and FIELD, GRAY and WHITE, JJ., concurred on the ground that the act of congress, being silent as to tolls, implied that the rates of toll should be as established by the two states; that the acts of incorporation constituted a contract between the corporation and both states, and that it could not be altered without the consent of both.

IN error to the Court of Appeals of the state of Kentucky.

This was an indictment in a court of the state of Kentucky against the Covington and Cincinnati Bridge Company for violation of a statute of that state regulating tolls on defendant's bridge. A demurrer to the indictment was sustained, but the judgment thereon was reversed on appeal by the Court of Appeals of the state (21 S. W. Rep. 1042), and on trial defendant was adjudged guilty and the conviction was affirmed on appeal by the Court of Appeals. 22 S. W. Rep. 851. Defendant brought error.

This was an indictment found by the grand jury of Kenton county, Ky., against the defendant bridge company for demanding and collecting illegal tolls, refusing to sell tickets at the rates required by law, and for failing to keep an office for the sale of tickets at its bridge in said county.

The Covington and Cincinnati Bridge Company was incorporated under an act of the legislature of Kentucky, approved February 17, 1846, the 3d section of which required the confirmation of the act by the state of Ohio before the corporation should open its books for subscription, and the 8th section of which declared that "the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon, with

their goods, carriages or animals of every description or kind; provided, however, that the said company shall lay before the legislature of this state a correct statement of the cost of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping the said bridge in repair and of the other expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll so that the net profits of the said bridge shall not exceed fifteen per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

By an act of the legislature of Ohio, enacted March 9, 1849, this company was made a body corporate and politic of that state, "with the same franchises, rights and privileges, and subject to the same duties and liabilities," as were specified in its original incorporation; and with a further proviso that "nothing herein contained shall be construed to take away the jurisdiction of this state to the center of the said bridge, nor in anywise to acknowledge the jurisdiction of the commonwealth of Kentucky this side of the said center."

On March 20, 1850, this act of confirmation was amended by the legislature of Ohio by granting the company "power to enter upon any lands in the city of Cincinnati, from low-water mark in the Ohio river northwardly, not exceeding one hundred feet in width, to Front street, and appropriate the same" for passageways and abutments, etc.

The original act of incorporation was amended by the legislature of Kentucky by the following among other subsequent acts:

(1) By act of February 23, 1856, authority was given to increase the capital stock from \$300,000 to \$700,000, with power in the city of Covington to subscribe for and purchase \$100,000.

(2) By act of February 6, 1858, the company was authorized to issue preferred stock under certain restrictions, such stockholders to receive dividends of six per cent.

(3) By act of February 5, 1861, the capital stock was increased to \$1,000,000, one-half of such amount in preferred stock, and to pledge the revenues of the company for the payment of dividends upon such preferred stock to the extent of fifteen per cent per annum.

(4) By the act of January 21, 1865, the capital stock was

increased to \$1,250,000, the additional \$250,000 being preferred stock, the holders of which should enjoy all the benefits, privileges and immunities to which the holders of the existing stock were entitled.

By the 6th section of this act the legislature reserved the right to change, alter or amend the original charter, "but not so as to abridge or injure legal or equitable rights acquired thereunder."

(5) By the act of February 25, 1865, the above 6th section was repealed.

(6) By the act of congress of February 17, 1865, the bridge was declared to be a lawful structure and post road for the conveyance of the mails of the United States. 13 Stat. 431.

The bridge was completed and opened for travel on January 1, 1867.

On April 9, 1890, the legislature of Kentucky passed another act amendatory of the act of incorporation, and out of which this prosecution arose, providing that it should be unlawful for any person or corporation to charge, collect, demand or receive for passage over the bridge spanning the Ohio river, constructed under such act of incorporation, any toll, fare or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the 8th section of the act of incorporation. The 2d section provided that the company should sell passage tickets over their bridge at these rates, entitling the holder to passage either way over said bridge; and, by the 3d section, the company was required to keep an office within the county of Kenton constantly open for the sale of such tickets, and keep conspicuously posted a schedule of the tolls fixed in pursuance of the act.

The company failing to conform to this last-mentioned act, this indictment was filed May 9, 1890. Defendant demurred thereto, and the case was submitted upon this demurrer and a statement of facts, showing the cost of the bridge structure and offices to have been \$1,855,462.36; the per cent of net earnings on cost for first 23 years, 4.82; the per cent of net earnings on cost for the year 1889, 6.14; the estimated per cent of net earnings on cost for 1890, 4.09, under the charges fixed by the directors; the esti-

mated percentage of net earnings on cost for the year 1890, under the act of which complaint was made, 1.06. The court sustained the demurrer and dismissed the indictments upon the ground that the act of 1890 impaired the obligation of the contract contained in the 8th section of the original act. The commonwealth appealed to the Court of Appeals, by which the judgment of the court below was reversed, and the case remanded, with directions to overrule the demurrer, and for further proceedings. The court adjudged the defendant guilty, and imposed a fine of \$1,000, from which judgment the defendant again appealed to the Court of Appeals, which affirmed the judgment of the court below, and certified, at the request of the appellant, the following questions as arising under the Constitution and laws of the United States:

(1) Whether the act of 1890 was within the constitutional inhibition of the laws impairing the obligation of contracts.

(2) Whether such acts were in violation of the exclusive power of congress to regulate commerce among the states.

(3) Whether said act was in violation of the fourteenth amendment, prohibiting the taking of private property without due process of law.

Defendant thereupon sued out a writ of error from this court.

Lawrence Maxwell, Jr., Wm. M. Ramsey, James W. Bryan, John F. Fisk and Chas. H. Fish, for plaintiff in error. *Wm. J. Hendrick, Attorney-General, Kentucky, and Wm. Goebel*, for defendant in error.

BROWN, J. (*after stating the facts*). This case involves the power of a state to regulate tolls upon a bridge connecting it with another state, without the assent of congress, and without the concurrence of such other state in the proposed tariff.

The right of the commonwealth of Kentucky to prescribe a schedule of charges in this instance is contested, not only upon the ground that such regulation is an interference with interstate commerce, but upon the further ground that it impairs the obligation of the contract contained in the original charter of the company.

The power of congress over commerce between the states, and the corresponding power of individual states over such commerce,

have been the subject of such frequent adjudication in this court, and the relative powers of congress and the states with respect thereto are so well defined that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to congress, and those in which the action of the state may be concurrent. The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by congress; third, those in which the action of congress is exclusive, and the states cannot interfere at all.

The first class, including all those wherein the states have plenary power, and congress has no right to interfere, concern the strictly internal commerce of the state, and, while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power the states may authorize the construction of highways, turnpikes, railways and canals between points in the same state, and regulate the tolls for the use of the same (*Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456), and may authorize the building of bridges over nonnavigable streams, and otherwise regulate the navigation of the strictly internal waters of the state — such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries. *Veazie v. Moor*, 14 How. 568; *The Montello*, 11 Wall. 411; 20 Wall. 430. This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The states may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society v. Coite*, 6 Wall. 594; *Provident Inst. v. Massachusetts*, 6 Wall. 611; *Hamilton Manufg. Co. v. Massachusetts*, 6 Wall. 632; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456; *Ashley v. Ryan*, 153 U. S. 436; 14 Sup. Ct. Rep. 865.

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the states (*U. S. v. De Witt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501), nor can it, by exacting a tax for carrying on a certain business, thereby authorize such business to be carried on within the limits of a state. License Tax cases, 5 Wall. 462. The remarks of the chief justice in this case contain the substance of the whole doctrine: "Over this [the internal] commerce and trade congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States. *Allen v. Newberry*, 21 How. 244. But later adjudications have ignored this distinction as applied to those waters. *The Belfast*, 7 Wall. 624, 641; *The Lottawanna*, 21 Wall. 558, 587; *Lord v. Steamship Co.*, 102 U. S. 541.

Under this power the states may also prescribe the form of all commercial contracts as well as the terms and conditions upon which the internal trade of the state may be carried on. The Trade Mark cases, 100 U. S. 82.

Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws of the regulation of pilots (*Cooley v. Board*, 12 How. 299; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236; *Wilson v. McNamee*, 102 U. S. 572); quarantine and inspection laws and the policing of harbors (*Gibbons v. Ogden*, 9 Wheat. 1, 203; *City of New York v. Miln*, 11 Pet. 102; *Turner v. Maryland*, 107 U. S. 38; 2 Sup. Ct. Rep. 44; *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455; 6 Sup. Ct. Rep. 1114); the improvement of navigable channels (*Mobile Co. v. Kimball*, 102 U. S. 691; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678; 2 Sup. Ct. Rep. 185; *Huse v. Glover*, 119

U. S. 543; 7 Sup. Ct. Rep. 313); the regulation of wharves, piers and docks (*Cannon v. New Orleans*, 20 Wall. 577; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; 2 Sup. Ct. Rep. 87; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; 7 Sup. Ct. Rep. 907); the construction of dams and bridges across the navigable waters of a state (*Wilson v. Marsh Co.*, 2 Pet. 245; *Cardwell v. Bridge Co.*, 113 U. S. 205; 5 Sup. Ct. Rep. 423; *Pound v. Turck*, 95 U. S. 459); and the establishment of ferries (*Conway v. Taylor*, 1 Black, 603).

Of this class of cases it was said by Mr. Justice CURTIS in *Cooley v. Board*, 12 How. 299, 318: "If it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. See, also, *Sturgis v. Crowninshield*, 4 Wheat. 192, 193. But, even in the matter of building a bridge, if congress chooses to act, its action necessarily supersedes the action of the state. *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421. As matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But whenever such laws, instead of being of a local nature and affecting interstate commerce but incidentally, are national in their character, the nonaction of congress indicates its will that such commerce shall be free and untrameled, and the case falls within the third class — of those laws wherein the jurisdiction of con

gress is exclusive. *Brown v. Houston*, 114 U. S. 622; 5 Sup. Ct. Rep. 1091; *Bowman v. Railway Co.*, 125 U. S. 456; 8 Sup. Ct. Rep. 689, 1062. Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination or regulation, upon commerce between the states. That while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall v. Nevada*, 6 Wall. 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one state to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn v. Illinois*, 94 U. S. 113, in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for the reception, storage and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property "affected with a public interest," and that from time immemorial in England, and in this country from its first colonization, it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold. That the decision does not necessarily imply a power in the states to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the chief justice (page 135), in delivering the opinion of the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged

in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though, in so doing, it may operate upon commerce outside its immediate jurisdiction." The principle of this case has been recently affirmed in *Budd v. New York*, 143 U. S. 517; 12 Sup. Ct. Rep. 468, and reaffirmed in *Brass v. North Dakota*, 153 U. S. 391; 14 Sup. Ct. Rep. 857, though not without strong opposition from a minority of the court.

The next case, viz., that of *Chicago, etc., Ry. Co. v. Iowa*, 94 U. S. 155, was a bill filed by the Chicago, Burlington and Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state." The complainant was also the lessee of the Burlington and Missouri railroad, in Iowa, the two roads being connected by a bridge, which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Plattsmouth on the Missouri river, in Iowa. The case was held to be covered by *Munn v. Illinois*, the road, like the warehouse in that case, being situated within the limits of a single state. "Its business," said the chief justice, "is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in interstate commerce and, until congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing, those without may be indirectly affected." In short, the case was treated as one of internal commerce only.

In the next case, viz.: *Peik v. Railway Co.*, 94 U. S. 164, it was held that under the Constitution of Wisconsin, providing that all acts creating corporations within the state "may be altered or repealed by the legislature at any time after their passage," the

legislature had a right to prescribe a maximum of charges to be made by the Chicago and Northwestern Railway Company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. The vital question is not discussed at any length, but it was held that, until congress acted with reference to the relations of this company to interstate commerce, it was within the power of the state of Wisconsin to regulate its affairs so far as they were of a domestic concern. These three cases were cited with approval in *Ruggles v. Illinois*, 108 U. S. 526 ; 2 Sup. Ct. Rep. 832, in which the power of a state to limit the amount of charges by a railroad company for fares and freight was recognized.

A similar principle, though under quite a different state of facts, was involved in *Hall v. De Cuir*, 95 U. S. 485, which concerned an act of the legislature of Louisiana, requiring those engaged in the transportation of passengers among the states to give all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in parts of the vessel, without distinction on account of race or color. The act was held to be a regulation of interstate commerce, and, therefore, unconstitutional and void. In the Railroad Commission cases, 116 U. S. 307 ; 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191, it was held that the right of a state to limit the charges of a railroad company for the transportation of persons or property within its jurisdiction could not be granted away by its legislature unless by words of positive grant or words equivalent in law ; and that a statute which granted to a railroad company the right from time to time to fix and regulate the tolls and charges by them to be received for transportation did not deprive the state of its power to act upon the reasonableness of the tolls and charges so fixed and regulated. It was held that the state might, "beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." "Nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company, or impair the usefulness of its facilities for inter-

state traffic. * * * The commission is in express terms prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of property taken up without the state and delivered within, nor of such as may be taken within and carried without." The court studiously avoided committing itself upon the question of the power of the commission over interstate commerce.

The prior cases were all reviewed, and the subject exhaustively considered in *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4, in which there came under review a statute of Illinois enacting that if any railroad company should, within that state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in that case made such discrimination in regard to goods transported over the same road or roads from Peoria, Ill., and from Gilman, in Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer the city of New York than the latter, this difference being in the length of line in the state of Illinois. The court held that such transportation was commerce among the states, even as to that part of the voyage which lay within the state of Illinois, and that the regulation of such commerce was confided to congress exclusively, under its power to regulate commerce between the states, and that the statute in question, being intended to regulate the transmission of persons or property from one state to another, was not within that class of legislation which the states may enact in the absence of legislation by congress. In delivering the opinion of the court, Mr. Justice MILLER cited the prior cases, and said that it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by congress upon the same subject. He further observed that "the great question to be decided, and

which was argued in all those cases, was the right of the state in which the railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others, and the case of *Munn v. Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehouse business in Chicago, * * * free from the question of continuous transportation through the several states; * * * and the question how far a charge made for a continuous transportation over several states, which included a state whose laws were in question, may be divided into separate charges for each state, in enforcing the power of the state to regulate the fares of its railroads, was evidently not fully considered." The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the states might regulate the charges for interstate traffic, they must be considered as overruled. See, also, *Bowman v. Railway Co.*, 125 U. S. 465; 8 Sup. Ct. Rep. 689, 1062. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash* case, and to that doctrine we still adhere.

The real question involved here is whether this case can be distinguished from the *Wabash* case. That involved the right of a single state to fix the charge for transportation from the interior of such state to places in other states. This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of congress or such other state, and thus involving the further inquiries — First, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep. 826, in which the state of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate

commerce, and, inasmuch as it appeared that the ferryboats were registered in New Jersey, and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that state. "Congress alone," said the court (page 204, 114 U. S., and page 826, 5 Sup. Ct. Rep.), "therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating for its own interests and products, and against those of other states." If, as was intimated in that case, interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington. And, while the reasons which influenced this court to hold in the *Wabash* case that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same; and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferryboat, and to argue that, while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. "Commerce" was defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189, to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a

tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two states are not instruments of commerce between such states in such sense as to exempt them from state control. In *Conway v. Taylor*, 1 Black, 603, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferriage, nor does it follow that, because a state may authorize a ferry or bridge from its own territory to that of another state, it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. It is true the states have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of congress for the construction of bridges over navigable waters, and by the 7th section of the act of September 19, 1890 (26 Stat. 426, 454), it is made unlawful to begin the construction of any bridge over navigable waters until the location and plan of such bridge have been approved by the secretary of war, who has also been in frequent instances authorized to regulate the tolls upon such bridges where they connected two states. So, too, in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; 2 Sup. Ct. Rep. 257, it was held

that a state had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the state, for boats which they owned and used in conveying, from a landing in the state, passengers and goods across a navigable river to another state. It was said that "the levying of a tax upon vessels or other water craft, or the exaction of a license fee by the state within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously, the case does not touch the question here involved. Upon the other hand, however, it was held, in *Moran v. New Orleans*, 112 U. S. 69; 5 Sup. Ct. Rep. 38, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running towboats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable, not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky; a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and, without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge, and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint, or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to

induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and, as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the state, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single state, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two states without involving a liability of controversies of a serious nature. For instance, suppose the agent of the bridge company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere brutum fulmen to attempt to punish such agent under the laws of Kentucky. Or, suppose the state of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one state to make the charge for foot passengers very low, and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

We do not wish to be understood as saying that, in the absence of congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled, as other questions of a judicial

nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 217; 5 Sup. Ct. Rep. 826: "Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of congress." Nor are we to be understood as passing upon the question whether, in the absence of legislation by congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the commonwealth of Kentucky in question in this case is an attempted regulation of commerce which it is not within the power of the state to make. As was said by Mr. Justice MILLER in the *Wabash* case: "It is impossible to see any distinction in its effects upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation."

The judgment of the Court of Appeals of Kentucky is, therefore, reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

FULLER, Ch. J., FIELD, GRAY and WHITE, JJ., concurred in the judgment of reversal for the following reasons:

The several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state or between two adjoining states, subject to the paramount authority of congress over interstate commerce.

By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each state, and authorized to fix rates of toll.

Congress, by the act of February 17, 1865, chapter 39, declared this bridge "to be, when completed in accordance with the laws of the states of Ohio and Kentucky, a lawful structure," but

made no provision as to tolls; and thereby manifested the intention of congress that the rates of toll should be as established by the two states. 13 Stat. 431.

The original acts of incorporation constituted a contract between the corporation and both states, which could not be altered by the one state without the consent of the other.*

The decision of the Court of Appeals of Kentucky, which is reversed by the principal case, will be found reported in 7 Am. R. R. & Corp. Rep. 638. On the subject of interstate commerce generally and the construction of the interstate commerce clause of the Federal Constitution, see *Norfolk & Western R. Co. v. Pennsylvania*, 2 Am. R. R. & Corp. Rep. 639, and note.

ARTHUR ET AL. V. OAKES ET AL.

(United States Circuit Court of Appeals, Seventh Circuit, October 1, 1894.)

1. RAILROAD EMPLOYEES. RIGHTS AND OBLIGATIONS OF. ENJOINING SAME FROM QUITTING THE SERVICE OR CONSPIRING TO DO SO. A court of equity will not, by injunction, prevent one individual from quitting the personal service of another. Such compulsion would be an invasion of the employee's natural liberty, and would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares should not exist within the United States or in any place subject to their jurisdiction.

2. The right of an employee, engaged to perform personal service, to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services.

3. The same rules and principles apply to employees of railroad companies and other quasi public corporations as to employees in other lines of service. The fact that employees of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employees, against their will, to remain in the personal service of their employer. The remedy in such cases must be provided by the legislature.

* Reported in 154 U. S. 204; 14 Sup. Ct. Rep. 1087.

4. The employees of a railroad company or of the receivers thereof, under a general contract of employment which does not limit the exercise of the right to quit the service, may, as the result of friendly argument, persuasion or conference among themselves, peaceably co-operate or agree together to quit the service in a body and without notice, and such combination or action would not be illegal or criminal although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience their employers and the public.

5. INJUNCTION AGAINST EMPLOYEES QUITTING SERVICE HELD ERRONEOUS. Where a railroad was in the hands of receivers, and it was made to appear that, in consequence of a proposed reduction of wages, the employees were threatening to quit the service in a body, and to injure and destroy the property of the road, and to interfere with the possession of the receivers, and to prevent the operation of the road, it was held, for the reasons above stated, that an order restraining the employees "from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad," was erroneous, and should have been stricken out on motion.

6. An order in the same case restraining said employees "from combining and conspiring to quit, with or without any notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad," was affirmed, as referring to combinations and conspiracies having the object and intent of crippling the property in the possession of the receivers by means of physical violence or interference, or of actually preventing the regular operation of the road.

7. WHAT AMOUNTS TO AN ILLEGAL CONSPIRACY. According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. So, a combination or conspiracy to procure an employee or body of employees to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law.

8. ILLEGAL CONSPIRACY OR COMBINATION OF EMPLOYEES. INJUNCTION. Where a railroad is in the hands of receivers, any combination or conspiracy upon the part of their employees would be illegal which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use engines, cars or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents, or against employees remaining in their service, or by using like methods to cause employees to quit, or prevent or deter others from entering the service in place of those leaving it, and such acts and combinations may be prevented by injunction.

9. The act of congress of June 20, 1886, legalizing the incorporation of national trade unions, does not sanction such illegal combinations as are above

referred to, and is not pertinent to the questions considered in the present case.

10. WHAT AMOUNTS TO A "STRIKE." A "STRIKE" NOT NECESSARILY ILLEGAL. In the absence of evidence, it cannot be held, as a matter of law, that a combination among employees, having for its object their orderly withdrawal in large numbers, or in a body, from the service of their employers, on account simply of a reduction in their wages, is not a "strike," within the meaning of that word as commonly used. Such a withdrawal, although amounting to a strike, is not illegal or criminal.

11. WHAT STRIKES MAY BE RESTRAINED. FORM OF INJUNCTION ORDER. According to the principle stated in the last syllabus, an order restraining the employees of the receivers of a railroad, the organization to which employees belong, their officers and committees, from combining to cause a strike of such employees, or from ordering, recommending, advising or approving such a strike, is too broad, and should be modified by indicating that the strikes intended to be restrained were such as were designed to physically injure or interfere with the trust property, or obstruct the operation of the road, or prevent, by unlawful means, the employment of other men.

PETITION by P. M. Arthur and others to modify certain injunctions issued in a consolidated suit brought by the Farmers' Loan and Trust Company and others against the Northern Pacific Railroad Company and its receivers, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse. 60 Fed. Rep. 803. The injunctions were only modified in part, and the petitioners appeal.

Quarles, Spence & Quarles, for appellants. *George P. Miller*, for appellees.

HARLAN, Circuit Judge. The questions before us relate to the power of a court of equity, having custody by receivers of the railroad and other property of a corporation, to enjoin combinations, conspiracies or acts upon the part of the receivers' employees and their associates in labor organizations, which, if not restrained, would do irreparable mischief to such property, and prevent the receivers from discharging the duties imposed by law upon the corporation.

The original bill was filed on behalf of stockholders and creditors of the Northern Pacific Railroad Company, a corporation created by an act of congress, and had for its general object the administration under the direction of the court of the entire railroad system, lands and assets of that corporation, and the enforcement of the respective rights, liens and equities of its preferred and common stockholders, bondholders and creditors.

The railroad company having filed its answer, receivers were appointed, with authority to take immediate possession of its railroads and other property, and to exercise its authority and franchises, conduct its business and occupation as a carrier of passengers and freight, discharge the public duties obligatory upon it, or upon any of the corporations whose lines of road were in its possession, preserve the property in proper condition and repair so as to be safely and advantageously used, protect the title and possession of the same, and employ such persons and make such payments and disbursements as were needful. The receivers were also authorized to manage all other property of the company at their discretion, and in such manner as in their judgment would produce the most satisfactory results consistent with the discharge of the public duties imposed on them, and to fix the compensation of officers, attorneys, managers, superintendents, agents and employees in their service. It was further ordered that an injunction issue against the defendant and all claiming to act by, through or under it, and against all other persons, to restrain them from interfering with the receivers in taking possession of and managing the property.

Subsequently the Farmers' Loan and Trust Company, as trustee for the holders of bonds and collateral trust indentures, filed an original bill in the same court against the Northern Pacific Railroad Company, the individual plaintiffs in the first suit, and the receivers. The relief asked was that the plaintiff, as trustee under the mortgages named in the bill, be placed in possession of the mortgaged premises, or that receivers of the rights, franchises and property of the railroad company be appointed with authority to operate its railroads and carry on its business under the protection of the court; that the liens created by the several mortgages be ascertained and declared, and that the mortgaged property, in certain contingencies, be sold and the proceeds applied according to the rights of the parties.

The railroad company having appeared in that suit, an order was entered appointing the same persons receivers who were appointed in the first suit, and the two suits were consolidated, to proceed together under the title of the Farmers' Loan & Trust Company v. Northern Pacific Railroad Company, etc.

By a writ of injunction dated December 19, 1893, the officers,

agents and employees of the receivers, including engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all persons, associations and combinations, voluntary or otherwise, whether in the service of the receivers or not, were enjoined —

From disabling, or rendering in any wise unfit for convenient and immediate use, any engine, cars or other property of the receivers ;

From interfering in any manner with the possession of locomotives, cars or property of the receivers, or in their custody ;

From interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the receivers, or with men employed by them to take the place of those who quit ;

From interfering with or obstructing in any wise the operation of the railroad, or any portion thereof, or the running of engines or trains thereon as usual ;

From any interference with the telegraph lines of the receivers along the lines of railways operated by them, or the operation thereof ;

From combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad ; and, generally,

From interfering with the officers and agents of the receivers or their employees in any manner, by actual violence or by intimidation, threats, or otherwise, in the full and complete possession and management of the railroad and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the receivers, whether belonging to them or to shippers or other owners, and from interfering with, intimidating or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway of the receivers, or any portion thereof, or by interfering in any manner, by actual violence or threat, and otherwise preventing or endeavoring to prevent the shipment of freight or the

transportation of the mails of the United States over the road operated by the receivers, until the further order of this court.

This injunction was based on a petition of the receivers, urging, in view of the general depression in the business of transportation, the necessity of reducing expenses, and representing to the court that many employees were threatening that if their compensation were diminished as indicated in a revised schedule of wages which the receivers had adopted, to take effect January 1, 1894, they would prevent or obstruct the operation of the railroads in the hands of the receivers.

A second writ of injunction was issued December 22, 1893. It was based on a supplemental petition of the receivers, and was in all respects like the former one, except that it contained, *in addition*, a clause by which the persons and associations to whom it was addressed were enjoined —

From combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, *and from ordering, recommending, approving or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time*, and from ordering, recommending, advising or approving, by communication or instruction or otherwise, the employees of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending or advising any committee or committees, or class or classes of employees of said receivers, to strike or join in a strike, on January 1, 1894, or at any other time, until the further order of this court.

The appellants, as chief executive officers, respectively, of the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen, the Order of Railway Telegraphers, the Brotherhood of Railway Trainmen and the Switchmen's Mutual Aid Association, appeared in court on behalf of themselves and their respective organizations and associations, as well as on behalf of such employees of the receivers as were members of those associations and organizations, or of some of them, and moved that the court modify the orders and injunctions of December 19, 1893, and December 22, 1893 —

(1) By striking from both writs of injunction these words: "And from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

(2) By striking from the writ of injunction of December 22, 1893, the above clause or paragraph relating specially to "strikes," which was not in the writ issued December 19, 1893.

The motion was in writing, and upon its face purported to be based on the petition and supplemental petition filed by the receivers, on the orders of the court made December 19 and 22, 1893, respectively, and on the above writs of injunction. Beyond the facts set out in those petitions, the only evidence adduced at the hearing of the motion was documentary in its nature, to wit, the constitutions and by-laws of the associations whose principal officers had been permitted to intervene in the cause.

The court, upon the hearing of the motion, modified the writ of injunction of December 22, 1893, by striking therefrom the above words in italics: "And from ordering, recommending, approving or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time."

The grounds upon which these words were stricken from the second writ of injunction are thus stated in the opinion of the court: "In fairness this clause must be read in the light of the statements of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations, and that the men would obey such orders, instead of following the direction of the court. The clause is specially directed to the chiefs of the several labor organizations. The use of the words 'order, recommend, approve or advise' was to meet the various forms of expression under which, by the constitution or by-laws of these organizations, the command was cloaked, as, for instance, in one organization the chief head 'advises' a strike; in another, he 'approves' a strike; in another, he 'recommends' the quitting of employ-

ment. Whatever terms may be employed, the effect is the same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear; that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending or advising a strike, or joinder in a strike.

"It is said, however, that the clause restrains an individual from friendly advice to the employees as a body, or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted, and the clause stricken from the writ."

Except in the particulars mentioned in the opinion of the Circuit Court, the motion to modify the injunctions was denied, and the injunctions continued in force. Of this action of the court the interveners complain.

In considering the important questions presented by the record, we have assumed, as did the Circuit Court, the truth of all the material facts set out in the petition and supplemental petition of the receivers. This is the necessary result of the interveners having based their motion on those petitions, and on the orders of the court directing writs of injunction to be issued. As those orders were based on the petitions of the receivers, it must be taken that the interveners, although insisting that the

injunction should have been modified to the full extent indicated by their motion, concede, for the purposes of the motion, the facts to be as alleged in those petitions.

It is consequently to be regarded as undisputed in this cause that at the time the writ of December 19, 1893, was issued, some of the railroad employees were giving it out and threatening that if the revised schedules and rates in question were enforced they would suddenly quit the service of the receivers; by threats, force and violence would compel other employees to quit such service, and by organized effort and intimidation prevent others from taking the places of those who might quit; would disable locomotives and cars so that they could not be safely used, or used only after expensive repairs; would take possession of the cars, engines, shops and roadbeds in the possession of the receivers, and otherwise prevent their being used; would so conduct themselves with regard to the property in the hands of the receivers as to hinder and embarrass them, their officers and agents, in its management and in the operation of trains; and that such dissatisfied employees, and others not in the employ of the receivers, but co-operating with those employees from a spirit of sympathy or mischief, would, unless restrained by the order of court, have carried out their threats, with the result that the receivers would not only have been compelled to abandon the revised schedules and rates proposed to be enforced, but would have been disabled from operating the railroads in their custody, from discharging their duties to the public as carriers of passengers and freight, and from transporting the mails of the United States, bringing thereby incalculable loss upon the trust property, as well as causing inconvenience and hardship to the public, particularly to the people in that part of the country traversed by the Northern Pacific railroad, who were dependent upon the regular, continuous operation of that road for commercial facilities of every kind, as well as for fuel, provisions and clothing.

It will be observed that the motion of the interveners does not question the power of the court to restrain acts upon the part of the employees or others which would have directly interfered with the receivers' possession of the trust property, or obstructed their control and management of it, as well as attempts, by force, intimidation or threats, or otherwise, to molest or interfere with

persons who remained in the service of the receivers or with others who were willing to take the places of those withdrawing from such service.

But it was contended that the Circuit Court exceeded its powers when it enjoined the employees of the receivers "from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of said receivers, with or without notice, as to cripple the property, or prevent or hinder the operation of said railroad."

This clause embodies two distinct propositions — one, relating to combinations and conspiracies to quit the service of the receivers with the object and intent of crippling the property or embarrassing the operation of the railroads in their charge; the other, having no reference to combinations and conspiracies to quit, or to the object and intent of any quitting, but only to employees "so quitting" as to cripple the property or prevent or hinder the operation of the railroad.

Considering these propositions in their inverse order, we remark that the injunction against employees so quitting as to cripple the property or prevent or hinder the operation of the railroad was equivalent to a command by the court that they should remain in the active employment of the receivers, and perform the services appropriate to their respective positions, until they could withdraw without crippling the property or preventing or hindering the operation of the railroad. The time when they could quit without violating the injunction is not otherwise indicated by the order of the court.

Under what circumstances may the employees of the receivers, of right, quit the service in which they are engaged? Much of the argument of counsel was directed to this question. We shall not attempt to lay down any general rule applicable to every case that may arise between employer and employees. If an employee quits without cause, and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement, and perhaps, in some states of case, to criminal

prosecution for loss of life or limb by passengers or others, directly resulting from his abandoning his post at a time when care and watchfulness were required upon his part in the discharge of a duty he had undertaken to perform. And it may be assumed, for the purposes of this discussion, that he would be liable in like manner where the contract of service, by necessary implication arising out of the nature or the circumstances of the employment, required him not to quit the service of his employer suddenly, and without reasonable notice of his intention to do so.

But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude — a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. To this class belong the cases of singers, actors or musicians, who, after agreeing, for a valuable consideration, to give their professional service, at a named place and during a specified time, for the benefit of certain parties, refuse to meet their engagement, and undertake to appear during the same period for the benefit of other parties at another place. *Lumley v. Wagner*, 1 De Gex, M. & G. 604, 617; 5 De Gex & S. 485; 16 Jur. 871; *Montagne v. Flockton*, L. R., 16 Eq. 189. While in such cases the singer, actor or musician has been enjoined from appearing during the period named at a place and for parties different from those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing or to act or to play. In *Powell Duffryn Steam-Coal Co. v. Taff Vale Ry. Co.*, 9 Ch. App. 331, 335, Lord Justice JAMES observed that when what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to

do some continuous act involving labor and care, the court has never found its way to do this by injunction. In the same case Lord Justice MELLISH stated the principle still more broadly, perhaps too broadly, when he said that a court can only order the doing of something which has to be done once for all, so that the court can see to its being done.

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employee engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 740, TAF_T, J., and authorities cited; *Fry Spec. Perf.* (3d Am. ed.) §§ 87-91, and authorities cited.

It is supposed that these principles are inapplicable or should not be applied in the case of employees of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employees of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employees and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employees and employers so far as necessary adequately to guard the rights of the public as involved in the existence, main-

tenance and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employee in their service. It was competent for the receivers in this case, subject to the approval of the court, to adopt a schedule of wages or salaries, and say to employees, "We will pay according to this schedule, and if you are not willing to accept such wages you will be discharged." It was competent for an employee to say, "I will not remain in your service under that schedule, and if it is to be enforced I will withdraw, leaving you to manage the property as best you may without my assistance." In the one case, the exercise by the receivers of their right to adopt a new schedule of wages could not, at least in the case of a general employment without limit as to time, be made to depend upon considerations of hardship and inconvenience to employees. In the other, the exercise by employees of their right to quit in consequence of a proposed reduction of wages could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property or to the public. The fact that employees of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their conduct or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employees, against their will, to remain in the personal service of their employer.

The result of these views is that the court below should have eliminated from the writ of injunction the words, "and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

But different considerations must control in respect to the

words in the same paragraph of the writs of injunction, "and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad." We have said that, if employees were unwilling to remain in the service of the receivers for the compensation prescribed for them by the revised schedules, it was the right of each one on that account to withdraw from such service. It was equally their right, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages, and to withdraw in a body from the service of the receivers because of the proposed change. Indeed, their right, as a body of employees affected by the proposed reduction of wages, to demand given rates of compensation as a condition of their remaining in the service, was as absolute and perfect as was the right of the receivers representing the aggregation of persons, creditors and stockholders interested in the trust property, and the general public, to fix the rates they were willing to pay their respective employees. But that is a very different matter from a *combination and conspiracy* among employees, with the *object and intent*, not simply of quitting the service of the receivers because of the reduction of wages, but of *crippling the property* in their hands, and *embarrassing the operation* of the railroad. When the order for the original injunction was applied for, it was represented—and the interveners admit by their motion that it was correctly represented—that unless the restraining power of the court was exerted the dissatisfied employees and others co-operating with them would physically disable and render unfit for use the cars and other property in the possession of the receivers, and by force, threats and intimidation used against employees remaining in their service, and against those desiring to take the places of those quitting, would prevent the receivers from operating the roads in their custody, and from discharging the duties which they owed on behalf of the corporation to the parties interested in the trust property, to the government and to the public.

The general inhibition against combinations and conspiracies formed with the object and intent of crippling the property and

embarrassing the operation of the railroad must be construed as referring only to acts of violence, intimidation and wrong of the same nature or class as those specifically described in the previous clauses of the writ. We do not interpret the words last above quoted as embracing the case of employees who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action, from the service of the receivers, using neither force, threats, persecution nor intimidation towards employees who do not join them, nor any device to molest, hinder, alarm or interfere with others who take or desire to take their places. We use the word "device" here as applicable to cases like that of *Sherry v. Perkins*, 147 Mass. 212, in which it appeared that parties belonging to a labor organization displayed and maintained certain banners in front of the plaintiff's place of business for the purpose of deterring workmen from remaining in or entering his service. As the acts complained of were injurious to the plaintiff's business and were a nuisance, it was held that they could be reached and restrained by injunction. So in *Spinning Co. v. Riley*, L. R., 6 Eq. 551, equity interfered by injunction to restrain the conduct of parties, officers of a trades union, who gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiff pending a dispute between the union and the plaintiff. See, also, *U. S. v. Kane*, 23 Feb. Rep. 748; *Emack v. Kane*, 34 Fed. Rep. 46; *Casey v. Typographical Union*, 45 Fed. Rep. 135; *Walker v. Cronin*, 107 Mass. 555.

These employees having taken service first with the company and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceful co-operation as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere

with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employees exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among employees, and their withdrawal from service.

The combinations or conspiracies which the law does not tolerate are of a different character. According to the principles of the common law, a conspiracy upon the part of two or more persons, *with the intent*, by their combined power, to wrong others, or to prejudice the rights of the public, is, in itself, illegal, although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employee or body of employees to quit service in violation of the contract of service would be unlawful, and, in a proper case, might be enjoined, if the injury threatened would be irremediable at law. It is one thing for a single individual, or for several individuals, each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal.

The general principle is illustrated in *Callan v. Wilson*, 127 U. S. 540, 555; 8 Sup. Ct. Rep. 1301. That was an information in the Police Court of the District of Columbia charging the defend-

ants Callan and others with a conspiracy to prevent certain named persons, who had been expelled from a local association, a branch of a larger one known as the Knights of Labor of America, from pursuing their calling of musicians anywhere in the United States. This result, the information charged, was to be effected by the defendants refusing to work as musicians, or in any other capacity, with the persons so named, or with or for any person, firm or corporation working with or employing them; by procuring all other members of those organizations, and all other workmen and tradesmen, not to work in any capacity with or for them or either of them, or for any firm or corporation that employed either of them; and by warning and threatening every person, firm or corporation employing such obnoxious persons that, if they did not forthwith cease to employ and refuse to employ them, they should not receive the custom or patronage either of the persons so conspiring, or of other members of said organizations. The question in the case was whether the accused were entitled to a trial by jury or whether the offense charged was of the class called "petty," for the trial of which a defendant could not at common law claim, of right, a jury. The court held that the offense charged was not a petty or trivial one, but one of a grave character, affecting the public at large, and for the trial of which a jury was, therefore, demandable as of right.

Among the authorities cited in that case were *Com. v. Hunt*, 4 Metc. (Mass.) 111, 121, in which it was said that "the general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual;" *State v. Burnham*, 15 N. H. 396, 401, where it was held that "combinations against law or against individuals are always dangerous to the public peace and to public security; to guard against the union of individuals to effect an unlawful design is not easy, and to detect and punish them is often extremely difficult;" and *Reg. v. Parnell*, 14 Cox Cr. Cas. 508, 514, where the court observed, that "an agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character; when done by one

alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of a combination."

One of the cases cited in *Callan v. Wilson* is *Com. v. Carlisle*, *Brightly N. P.* 36, 39, 40, in which Mr. Justice GIBSON considered the law of conspiracy with care, and among other things said: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible nor carry the operation of his interest or that of any other individual beyond the limits of fair competition. But, the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."

There are many other adjudged cases to the same effect. In *State v. Stewart*, 59 *Vt.* 273, 286; 9 *Atl. Rep.* 559, it was held, after an extended review of the authorities, that: "A combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are per se indictable, immoral or wrongfully prejudicial to the rights of others. If they seek to restrain trade, or tend to the destruction of the material property of the country, they work injury to the whole people."

In *State v. Buchanan*, 5 *Har. & J.* 317, 352, 355, the Court of Appeals of Maryland adjudged that: "Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an

indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected, which may be perfectly indifferent, and makes no ingredient of the crime, and, therefore, need not be stated in the indictment." Again: "There is nothing in the objection that to punish a conspiracy where the end is not accomplished would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offense by the nature of the object to be effected."

In *State v. Glidden*, 55 Conn. 46, 75; 8 Atl. Rep. 890, the court said: "Any one man or any one of several men acting independently is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its number increases. * * * The combination becomes dangerous and subversive of the rights of others, and the law wisely says that it is a crime."

In *Queen v. Kenrick*, 5 Q. B. 49, Chief Justice DENMAN said that by the law of conspiracy, as it had been administered for at least the previous hundred years, any combination to prejudice another unlawfully was considered as constituting the offense, and that the offense consisted in the conspiracy, and not in the acts committed for carrying it into effect.

See, also, *Carew v. Rutherford*, 106 Mass. 1, 13; *Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *Cœur d'Alene C. & M. Co. v. Miners' Union*, 51 Fed. Rep. 260, 267; 3 Whart. Cr. Law (8th ed.), § 1337 et seq.; 2 Archb. Cr. Pr. & Pl. (Pom. ed.) 1830, note; 2 Bish. Cr. Law, § 180 et seq.

It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employees would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use engines, cars or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents, or against employees remaining in their service, or by using like methods to cause employees to quit or prevent or

deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter or attempt to enter the service of those against whom such combinations are specially aimed. And as acts of the character referred to would have defeated a proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the Circuit Court properly framed its injunction so as to restrain all such acts as are specifically mentioned, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad by the receivers.

Some reference was made in argument to the act of congress of June 29, 1886, legalizing the incorporation of national trades unions. 24 Stat. 86, chap. 567. It is not perceived that this reference is at all pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the states or territories of the United States, and established "for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled or unemployed members or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit." Associations of that character are authorized to make and establish such constitutions, rules and by-laws as they deem proper to carry out their lawful objects. Those objects, as defined by congress, are most praiseworthy, and should be sustained by the courts whenever their power to that end is properly invoked. What we have said about

illegal combinations has no reference to such associations, but only to combinations formed with the intent to employ force, intimidation, threats or other wrongful methods whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best.

The principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal, although nothing may have been done in execution of that intent, has been embodied in the statutes of Wisconsin, in which state the present cause is pending. By an act passed April 2, 1887, it was declared that: "Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be punishable by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars."

And by a subsequent act, passed April 8, 1887, it was declared that: "Any two or more employers who shall agree, combine and confederate together for the purpose of interfering with or preventing any person or persons seeking employment, either by threats, promises or by circulating or causing the circulation of a so-called black list, or by any means whatsoever, or for the purpose of procuring and causing the discharge of any employee or employees, by any means whatsoever, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for a period of not more than one year, or by a fine of not less than fifty dollars, or by both." 1 Laws Wis. 1887, pp. 299, 380, chaps. 287, 349; 2 Sanb. & B. St. Wis. §§ 4466a, 4466b.

This legislation was followed by an act, published May 3, 1887, providing: "Section 1. Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage-worker, or who

shall attempt to so hinder or prevent, shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment in the discretion of the court.

“Sec. 2. Any person who shall individually or in association with one or more others, willfully break, injure or remove any part or parts of any railway car or locomotive, or any other portable vehicle or traction engine, or any part or parts of any stationary engine, machine, implement or machinery, for the purpose of destroying such locomotive, engines, car, vehicle, implement or machinery, or of preventing the useful operation thereof, or who shall, in any other way, willfully or maliciously interfere with or prevent the running or operation of any locomotive, engine or machinery, shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail or the state prison not exceeding two years, or both fine and imprisonment in the discretion of the court.” 1 Laws Wis. p. 462, chap. 427.

It thus appears that combinations and conspiracies by two or more persons, with the intent to injure the rights of others, were illegal at common law, and are public offenses in the state where this cause is pending.

For the reasons stated, we are of opinion that the Circuit Court properly refused to strike from the writs of injunction the words, “And from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad.”

We come next to that clause in the writ of injunction of December 22, 1893, expressly relating to strikes.

What is to be deemed a strike within the meaning of the order of the Circuit Court? In the opinion of the Circuit judge, made a part of the record, we are informed that at the argument below the definition proffered to the court by the interveners as one recognized by the labor organizations of the country was as follows: “A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of employment are changed. The employee declines to longer work, knowing full well that the employer may imme-

diately employ another to fill his place, also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employee to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions."

The learned Circuit judge said that a more exact definition of a strike was "a combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand," and he said: "It is idle to talk of a peaceful strike. None such ever occurred. The suggestion is an impeachment of intelligence. All combinations to interfere with perfect freedom in the proper management of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic, or with the lawful employment of others, are within the condemnation of the law. It has been well said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but by the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force, to accomplish the end designed."

Under this view of the nature and object of strikes the injunction was directed, generally, against combinations and conspiracies upon the part of employees with the design or purpose of causing a strike on the lines of railroad operated by the receivers; against the ordering, recommending, advising or approving the employees to join in a strike, and against the ordering, recommending or advising any committee or class of employees to strike, or to join in a strike.

If the word "strike" means in law what the Circuit Court held it to mean, the order of injunction, so far as it relates to strikes, is not liable to objection as being in excess of the power of a court of equity. Indeed, upon the facts presented by the receiv-

ers and admitted by the motion of the interveners, it was made the duty of the court to exert its utmost authority to protect both the property in its charge and the interests of the public against all strikes of the character described in the opinion of the Circuit judge.

But in our judgment the injunction was not sufficiently specific in respect to strikes. We are not prepared, in the absence of evidence, to hold, as matter of law, that a combination among employees, having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages is not a "strike," within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal. In *Farrer v. Close*, L. R., 4 Q. B. 602, 612, Sir JAMES HANNEN, afterwards lord of appeal in ordinary, said: "I am, however, of opinion that strikes are not necessarily illegal. A 'strike' is properly defined as 'a simultaneous cessation of work on the part of the workmen;' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either master or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employees, or any other lawful purpose."

In our opinion the order should describe more distinctly than it does the strikes which the injunction was intended to restrain. That employees and their associates may not unwittingly place themselves in antagonism to the court's authority, and become subject to fine and imprisonment as for contempt, the order should indicate more clearly than has been done that the strikes intended to be restrained were those designed to physically cripple the trust property, or to actually obstruct the receivers in the operation of the road, or to interfere with their employees who do not wish to

quit, or to prevent, by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employees, in peaceable ways, of rights clearly belonging to them, and were not designed to embarrass or injure others, or to interfere with the actual possession and management of the property by the receivers.

In our consideration of this case we have not overlooked the observations of counsel in respect to the use of special injunctions to prevent wrongs which, if committed, may be otherwise reached by the courts. It is quite true that this part of the jurisdiction of a court of equity should be exercised with extreme caution, and only in clear cases. *Brown v. Newall*, 2 Mylne & C. 558, 570. Mr. Justice BALDWIN, in *Bonaparte v. Railroad Co.*, Baldw. 205, 217; Fed. Cas. No. 1617, properly said: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless in cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well-established principles, for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its own suitors and its own principles to administer the only remedy the law allows to prevent the commission of the act."

The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. It is, Justice STORY said, because of the varying circumstances of cases, "that courts of equity constantly decline to lay down any rule

which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld." "And," the author proceeds, "there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts, thus operating by special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and, therefore, should be fostered and upheld by a steady confidence." Story Eq. Juris. § 959b.

In using a special injunction to protect the property in the custody of the receivers against threatened acts which it is admitted would, if not restrained, have been committed, and would have inflicted irreparable loss upon that property, and seriously prejudiced the interests of the public, as involved in the regular, continuous operation of the Northern Pacific railroad, the Circuit Court, except in the particulars indicated, did not restrain any act which, upon the facts admitted by the motion, it was not its plain duty to restrain. No other remedy was full, adequate and complete for the protection of the trust property, and for the preservation of the rights of individual suitors and of the public in its due and orderly administration by the court's receivers. "It is not enough," the court said in *Boyce's Exrs. v. Grundy*, 3 Pet. 210, "that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity." And the application of the rule that equity will not interfere where there is an adequate remedy at law must depend upon the circumstances of each case as it arises. *Watson v. Sutherland*, 5 Wall. 74, 79. That some of the acts enjoined would have been criminal, subjecting the wrongdoers to actions for damages or to criminal prosecution, does not, therefore, in itself determine the question as to interference by injunction. If the acts stopped at crime, or involved merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involved irreparable injury to and destruction of property for all the purposes for which that property was adapted, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate. "Formerly,"

Mr. Justice STORY says, "courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country." 2 Story Eq. Juris. § 928. So, in respect to acts which constitute a nuisance injurious to property, if "the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the court by way of injunction." Kerr Inj. 166, chap. 6, and authorities there cited. This jurisdiction, the author says, was formerly exercised sparingly and with caution, "but it is now fully established, and will be exercised as freely as in other cases in which the aid of the court is sought for the purpose of protecting legal rights from violation."

In the course of the argument some reference was made to the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209. It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act, and upon the general principles that control the exercise of jurisdiction by courts of equity.

For the reasons we have stated the order complained of is reversed in part, and the cause is remanded with directions to sustain the motion to strike out and modify the injunction to the extent indicated in his opinion. Reversed.*

1. Unlawful combinations and conspiracies of railroad employees — strikes and boycotts.— Where the members of a labor organization combine and confederate for the purpose of enforcing their demands by the seizure of their employers' property, or to prevent other men, by force and intimidation,

* Reported in 63 Fed. Rep. 310.

from entering such employment, they are guilty of a criminal conspiracy and, where such acts violate an injunction, they will be punished for contempt of court. *Lake Erie & W. R. Co. v. Bailey*, 61 Fed. Rep. 494.

A combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the states, within the act of July 2, 1890, and acts threatened in pursuance thereof may be restrained by injunction, under section 4 of the act. *United States v. Elliott*, 62 Fed. Rep. 801; 64 Fed. Rep. 27.

A corrupt or wrongful agreement between two or more persons that the employees of railroads carrying the mails and conducting interstate commerce should quit, and that all others should, by threats or violence, be prevented from taking their places, constitutes a criminal conspiracy to hinder or obstruct the mails and interstate commerce. *In re Grand Jury*, 62 Fed. Rep. 828.

To the same effect as the foregoing are *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. Rep. 803; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. Rep. 803; *In re Grand Jury*, 62 Fed. Rep. 840; *In re Grand Jury*, 62 Fed. Rep. 834; *United States v. Debs*, 63 Fed. Rep. 436; *Watertown v. Corner*, 55 Fed. Rep. 149; *Wick China Co. v. Brown*, (Penn.) 30 Atl. Rep. 261; *Cœur d'Alene Min. Co. v. Miners' Union*, 51 Fed. Rep. 260; *Longshore Printing & Pub. Co. v. Howell*, (Oreg.) 38 Pac. Rep. 547; *Barr v. Essex Trades Council*, (N. J.) 30 Atl. Rep. 881; *Reynolds v. Everett*, (N. Y.) 39 N. E. Rep. 72; *United States v. Debs*, 64 Fed. Rep. 724.

2. Combinations of employees to interfere with the operation of railroads or steamboats engaged in interstate commerce are in violation of the Federal Anti-Trust Act of July 2, 1890.—This proposition has been expressly decided in the following cases: *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; 6 C. C. A. 258; 57 Fed. Rep. 85; *United States v. Elliott*, 62 Fed. Rep. 801; 64 Fed. Rep. 27; *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. Rep. 803, 821; *In re Grand Jury*, 62 Fed. Rep. 840. See, also, *Watertown v. Corner*, 55 Fed. Rep. 149, 157.

3. A bill will lie on behalf of the United States to restrain such combinations and acts in pursuance thereof.—*United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; 6 C. C. A. 258; 57 Fed. Rep. 85; *United States v. Elliott*, 62 Fed. Rep. 801; 64 Fed. Rep. 27; *United States v. Debs*, 64 Fed. Rep. 724.

4. Injunction to prevent an unlawful interference with railroads by strikers and others.—It seems to be now accepted as established law that a bill will lie by a railroad company to prevent unlawful combinations and conspiracies, formed to obstruct the operation of its road, or to injure or destroy its property, or to intimidate its employees who are willing to work, or to prevent, by force and threats, the employment of men in place of others who have quit, or to coerce the company, by force, threats and violence, into any concession or particular course of conduct, and also to prevent all acts in pursu-

ance of such unlawful combinations and conspiracies. Toledo, Ann Arbor, etc., R. Co. v. Pennsylvania R. Co., 54 Fed. Rep. 730, 746; Lake Erie & W. R. Co. v. Bailey, 61 Fed. Rep. 494. Where the railroad is in the hands of receivers the same relief may be had on a petition by the receivers. Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. Rep. 808, affirmed in the principal case, so far as the relief indicated is concerned. Thomas v. Cincinnati, etc., R. Co., 62 Fed. Rep. 808. Where the railroad is engaged in interstate commerce a bill will lie for the same relief on behalf of the United States. See cases cited in last section.

The principle is general and applies not only to railroads, but to common carriers by water, and to manufacturers, producers and others whenever the ordinary remedies are inadequate. Casey v. Cincinnati Typographical Union No. 8, 45 Fed. Rep. 185; Coeur d'Alene Con. & Min. Co. v. Miners' Union, 51 Fed. Rep. 260; Blindell v. Hagan, 54 Fed. Rep. 40; Hagan v. Blindell, 6 C. C. A. 86; 56 Fed. Rep. 696; Wick China Co. v. Brown, (Penn.) 80 Atl. Rep. 261; Murdock v. Walker, (Penn.) 25 Atl. Rep. 492; Sherry v. Perkins, 147 Mass. 212; Barr v. Essex Trades Council, (N. J.) 80 Atl. Rep. 881; Longshore Printing & Pub. Co. v. Howell, (Oreg.) 88 Pac. Rep. 547; Reynolds v. Everett, (N. Y.) 89 N. E. Rep. 72.

5. The boycott of Pullman cars in July, 1894—various questions decided with reference to such boycott.—A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, in violation of their contracts, and, on their refusal, to inflict pecuniary injury on them by inciting their employees to quit their service, and thus paralyze their business, the existence of the contracts being known to the parties so combining, is an unlawful conspiracy. Thomas v. Cincinnati, etc., R. Co., 62 Fed. Rep. 808. A combination by employees of railway companies to injure in his business the owner of cars operated by the company, by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employees so combining, is a boycott, and an unlawful conspiracy at common law. Ibid. A combination to incite the employees of all railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employees more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise. Ibid.

Though a railroad company engaged in interstate commerce must, unless prevented by circumstances beyond its control, run trains in a reasonable manner, and as often as the ordinary business of commerce requires, yet, where the composition of its trains, as ordinarily made up, is reasonable and appropriate to the service required, it is not obliged, on the refusal of its employees to move the trains so long as certain cars are thereon, to leave off such cars, and run the rest of the train. In re Grand Jury, (Ross, J.) 62 Fed. Rep. 884.

6. Mandatory injunction to compel railroad employees to handle trains with Pullman cars attached so long as they remain in the service.—Where employees of a railroad company, though remaining in its employment, refuse to perform their duties of operating its trains so long as Pullman cars are hauled, though the company is bound by contract to carry them, thus interrupting interstate commerce and the transmission of mails, and subjecting the company to suits and great and irreparable damage, injunction will issue requiring them to perform their duties during their continuance in the company's employment. *Southern California R. Co. v. Rutherford*, 62 Fed. Rep. 796. Ross, J., says: "Why should not men who remain in the employment of another perform the duties they contract and engage to perform? It is certainly just and right that they should do so or else quit the employment. And where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, will compel them to perform the duties pertaining to the employment so long as they continue in it. If I unlawfully obstruct by a dam a stream of flowing water equity, at the suit of the party injured, will compel me by injunction, mandatory in character, to remove the dam, and, prohibitory in character, from further interfering with the flow of the stream; and if I unlawfully erect a wall shutting out the light from another, equity will compel me to tear it down and to refrain from further interference with the other's rights. It is true that such cases are not precisely like the present one, yet the principle upon which the court proceeds in such cases is not substantially different. And if it be said that there is no exact precedent for the awarding of an injunction in the present case, I respond in the language of the court in the case of *Toledo, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 751: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief.'"

7. Interference with United States mails by strikers or others.—Combinations of employees, where the members intend to stop all mail trains as well as other trains, and do delay many, in violation of Revised Statutes, section 8995, punishing any one willfully and knowingly obstructing or retarding the passage of the mails, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment. *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. Rep. 808.

It is a violation of Revised Statutes, section 8995, declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up, though he is willing that the mail car shall go on, and his purpose is other than to retard the mails. In re Grand Jury, (Morrow, J.) 62 Fed. Rep. 840. See, also, In re Grand Jury, (Grosscup, J.) 62 Fed. Rep. 828; In re Grand Jury, (Ross, J.) 62 Fed. Rep. 834. See cases cited in next section.

8. Duty of railroad company as to carrying mails in case of strikes and boycotts on the road.—Where the regular passenger trains of a railroad have been designated for the carrying of mail, failure of the railroad to run other trains for that purpose is not in violation of the statute against obstruction and interruption of the mail. *In re Grand Jury*, 62 Fed. Rep. 834.

The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. *In re Grand Jury*, 62 Fed. Rep. 840.

Where the transportation of mails and interstate commerce has long been interrupted by the refusal of the employees of the railway company to move trains carrying Pullman cars, it is the duty of the railway company to use every effort to move the mails and interstate commerce, without regard to the make-up of regular trains; and any willful failure to perform this duty is a violation of the statute. *Ibid*.

9. Contempt of court by interfering with a railroad in the hands of receiver.—Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court. *TAFT, J., Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. Rep. 803. Maliciously inciting employees of a receiver, who is operating a railroad under order of the court, to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, is a contempt of the court. *Ibid*. Such inciting to carry out an unlawful conspiracy is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious. *Ibid*. Other cases holding that any unlawful interference with the operation of a railroad in the hands of a receiver is a contempt of court are the following: *Secor v. Railroad Co.*, 7 Biss. 518; *United States v. Kane*, 23 Fed. Rep. 748; *In re Doolittle*, 23 Fed. Rep. 544; *In re Higgins*, 27 Fed. Rep. 443.

10. Railroads in hands of receivers — wages and terms of employment — supervision by court.—Where the property of a railway or other corporation is being administered by a receiver under the superintending power of a court of equity, it is competent for the court to adjust difficulties between the receiver and his employees, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. *Waterhouse v. Corner*, 55 Fed. Rep. 149; *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. Rep. 669.

Employees of a receiver alleging grievances against him may be heard by the court upon making proper application therefor, and if it is of opinion that the allegations demand further investigation it will order the receiver to

answer the same, and from these pleadings will determine whether the issue is one requiring a formal investigation by the taking of evidence. *Continental Trust Co. v. Toledo, etc., R. Co.*, 59 Fed. Rep. 514. Upon complaint by the employees of a railroad receiver in respect to a reduction of their wages, the court will not interfere to reverse the receiver's administration by settling the details of the complaints, involving, as this would, an extensive investigation of administrative details, but if an abuse of discretion is made manifest, will select a new receiver, to whom such matters may more satisfactorily be intrusted. *Ibid.* When the court appoints a receiver to carry on a business, it necessarily commits to his discretion the management of all administrative details relating thereto, and will not interfere therewith unless an abuse of discretion is made to appear. *Ibid.*

Where a receiver petitions for a reduction of employees' wages, the employees concerned should be notified and accorded a hearing. *United States Trust Co. v. Omaha, etc., R. Co.*, 63 Fed. Rep. 737; *Ames v. Union Pac. R. Co.*, 60 Fed. Rep. 674. Where the wages paid to faithful and competent employees of a railroad in the hands of a receiver are not shown to be excessive for the labor performed, and are not higher than the wages paid to like employees on other lines of similar character, operated under like conditions through the same country, the court will not, against the protest of its said employees, reduce their wages because of inability of the railroad to pay dividends or interest, even though present opportunity exists for securing other employees for less wages. *United States Trust Co. v. Omaha, etc., R. Co.*, 63 Fed. Rep. 737.

Previous to the appointment of receivers of a company operating an extensive railroad system, the relations between it and its employees, and their rates of wages, had been determined mainly by certain rules, regulations and schedules, which had remained substantially unchanged for years, and which were the results of conferences between the managers of the railroad and representatives of organizations of the employees. One of such rules and regulations was that no change should be made in them, or in the rate of wages, without certain notice to the organization whose members would be affected. Held, that the schedules of wages must be presumed to be reasonable and just, and that new and reduced schedules, adopted by the receivers without notice to the employees or their representatives, would not be approved by the court, although recommended by a majority of the receivers, one only of them being a practical railroad manager, and he testifying that the new schedules should not be put in force without some modifications, and it appearing that the allowances made by the existing schedules were in fact just and equitable, when all the conditions were considered. *Ames v. Union Pac. R. Co.*, 62 Fed. Rep. 7.

A reduction of wages by a receiver was approved in *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. Rep. 17.

A receiver of a railroad is not bound by an agreement, made before his appointment, between the railroad company and its employees, whereby the latter are not to be discharged except for cause, to be determined by arbitrators. *In re Seattle, L. S. & E. R. Co.*, 61 Fed. Rep. 541.

11. Reinstatement of striking employees by receiver — when not

ordered by the court.—Employees of receivers of a railroad joined in a general strike, without grievance of their own, for the purpose of compelling, by obstruction of travel and hindrance to traffic, parties to one side of a pending controversy to yield actual or supposed rights, quitting the service under such circumstances as made it necessary to fill their places in order to continue the operation of the road. Held, that the court should not, by reason of their past services, direct the receivers to reinstate them, as they had not been discharged for fault, and their reinstatement would displace competent and worthy men, who had worked during the strike under abuse from crowds in sympathy with the strikers. Nor was an order for their re-employment in other positions necessary, where without it they would be called upon to fill vacancies as they should occur. *Booth v. Brown*, 62 Fed. Rep. 794.

WEBSTER V. FITCHBURG R. Co.

(Supreme Judicial Court of Massachusetts, May 17, 1894.)

RAILROAD COMPANIES AS CARRIERS. WHO ARE PASSENGERS. INCEPTION OF THE RELATION. A person, in possession of a ticket, who, while running from the street, across the company's tracks, outside the passenger station, apparently to catch a train about to start, is struck and killed by another train, has not become a passenger.

ACTION by Elizabeth S. Webster, administratrix of the estate of William Webster, against the Fitchburg Railroad Company, for damages for the death of intestate by defendant's negligence. Verdict directed for defendant, and plaintiff excepts.

George W. Moore, Samuel J. Elder and Stephen H. Tyng, for plaintiff. Geo. A. Torrey, for defendant.

KNOWLTON, J. At the trial the plaintiff relied solely on her count under Public Statutes, chapter 73, section 6, in which she alleged that her intestate was a passenger on the defendant's railroad, and the only question in the case is whether there was evidence to warrant the jury in finding that he was a passenger. He had in his pocket a ten-trip ticket, which entitled him to ride over the defendant's railroad between Boston and the station in Somerville where the accident happened; and, immediately before he was struck and killed, he was running very rapidly, from the direction of the public street, across the defendant's premises outside of the passenger station, to a track on which was an incom-

ing train, apparently with view to take another train, which was about to start for Boston, on the track beyond. It is contended in behalf of the plaintiff that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises, in a place designed for the use of passengers, outside of the station, and was about to take a train, he had become a passenger.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company, to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this the question is whether the person has presented himself in readiness to be carried, under such circumstances, in reference to time, place, manner and condition, that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In *Dodge v. Steamship Co.*, 148 Mass. 207; 19 N. E. Rep. 373, it was said that "when one has made a contract for passage upon the vehicle of a common carrier, and has presented himself, at a proper place, to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of

the railroad company, and it would not be expected to accept him as a passenger. In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present, and speaking by a representative who saw him, there was no instant when the answer to his request would not have been: "We will not accept you as a passenger while you are exposing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way." The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case. *Dodge v. Steamship Co.*, ubi supra; *Merrill v. Railroad Co.*, 139 Mass. 238; 1 N. E. Rep. 548; *Com. v. Boston & M. R. Co.*, 129 Mass. 500; *Warren v. Railroad Co.*, 8 Allen, 227; *Baltimore Traction Co. v. State*, (Md.) 28 Atl. Rep. 397. Exceptions overruled.*

Railroad companies—what constitutes the relation of carrier and passenger—inception of the relation.—It is difficult to lay down any general rules upon these questions. The following cases will be found in point: *Buffett v. Troy & Boston R. Co.*, 40 N. Y. 168; *June v. Boston & Albany R. Co.*, 153 Mass. 79; *Gordon v. Grand St. & N. R. Co.*, 40 Barb. 546; *North Chicago Street R. Co. v. Williams*, 140 Ill. 275; 29 N. E. Rep. 672; *Johns v. Charlotte, etc., R. Co.*, 39 S. C. 162; 17 S. E. Rep. 698; *Norfolk & W. R. Co. v. Galligher*, 89 Va. 639; 16 S. E. Rep. 935; *Mellquist v. The Wasco*, 53 Fed. Rep. 516; *Rogers v. Kennebec Steamship Co.*, ante, p. 332. See, generally, *Hutchinson Carr.* § 554; 2 Wood Ry. § 298; 24 L. R. A. 521, note.

In *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa, 264, the plaintiff went to the station to take passage in the caboose of a freight train, as she had been previously informed by the ticket agent she could do. She offered to purchase a ticket, but he informed her she could pay on the train, and he pointed out the caboose and directed her to get on, but did not go with her or assist her. Being inexperienced, and not seeing any way to get on the car as she approached it, she attempted to pass round it, and in doing so, was injured by cars being backed against it. It was held that the relation of passenger existed, though she had not purchased a ticket or entered the car.

* Reported in 161 Mass. 298; 37 N. E. Rep. 165.

A railroad company, for its convenience and that of shippers, had constructed, at the termination of its track on Black river, an elevator, or platform car, which was used in lowering and raising freight, on an incline track extending from its depot, on the bank, to the water's edge; and the plaintiff's husband, having prepared for shipment a small cargo of fish, and placed same on platform of the elevator, undertook to ride thereon, without defendant's consent, up to the station, when the wire rope by means of which the car was operated suddenly broke, while the car was ascending, and caused the injury and death of deceased. Held, plaintiff cannot recover, because the deceased was not a passenger, and no contractual or quasi contractual relations existed between him and the defendant, he being a mere stranger or trespasser on the company's property. *Snyder v. Natchez R. & T. Co.*, 42 La. Ann. 802; 7 South. Rep. 582. If a person, by his own solicitation or consent, is carried upon a vehicle or conveyance which is not used for the purpose of passenger carriage, there can be no presumption that he was a passenger, although the owner be a common carrier of passengers by other and different means of conveyance. *Ibid.*

BURDICK V. PEOPLE.

(Supreme Court of Illinois, April 2, 1894.)

1. COMMON CARRIERS. ACT TO REGULATE SALE OF TICKETS AND PREVENT TICKET SCALPING. VALIDITY. An act of Illinois requiring owners of railroads and steamboats to provide each ticket agent with a certificate of authority, and to redeem tickets which are wholly or partly unused, and forbidding persons not having such certificates to sell such tickets, except that any one who has bought a ticket from a certified agent, with the bona fide intention of traveling upon the same, may sell it, is not unconstitutional as depriving any person of property without due process of law, or as impairing the obligation of contracts.

2. The act is not in conflict with the Federal Constitution, as interfering with interstate commerce, though it applies to tickets entitling the holder to travel on any railroad or steamboat, "whether the same be situated, operated or owned within or without the limits of this state."

3. Nor is the act in conflict with that provision of the State Constitution, which prohibits the general assembly from "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

Hill & Martin, for plaintiff in error. *Maurice T. Maloney*, Attorney-General, and *J. M. Herbert*, State's Attorney (*W. S. Forrest* and *M. Rosenthal*, of counsel), for the people.

MAGRUDER, J. This was an indictment against plaintiff in error for wrongfully and unlawfully selling to one L. H. Myers one

certain railroad ticket, entitling the holder thereof to travel upon the Illinois Central railroad from Cairo, in Illinois, to Chicago, in the same state, in violation of the following statute of Illinois :

“ An act to prevent frauds upon travelers and owner or owners of any railroad, steamboat or other conveyance for the transportation of passengers. Approved April 19, 1875. In force July 1, 1875.

“ Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly : That it shall be the duty of the owner or owners of any railroad or steamboat for the transportation of passengers, to provide each agent who may be authorized to sell tickets or other certificates entitling the holder to travel upon any railroad or steamboat, with a certificate setting forth the authority of such agent to make such sales, which certificate shall be duly attested by the corporate seal of the owner of such railroad or steamboat.

“ Sec. 2. That it shall not be lawful for any person not possessed of such authority, so evidenced, to sell, barter or transfer for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidences of the holder's title to travel on any railroad or steamboat, whether the same be situated, operated or owned within or without the limits of this state.

“ Sec. 3. That any person or persons violating the provisions of the second section of this act shall be deemed guilty of misdemeanor, and shall be liable to be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding one year, or either or both, in the discretion of the court in which such person or persons shall be convicted.

“ Sec. 4. That it shall be the duty of every agent who shall be authorized to sell tickets, or parts of tickets, or other evidences of the holder's title to travel, to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request him, the certificate of his authority thus to sell, and to keep said certificate posted in a conspicuous place in his office for the information of travelers.

“ Sec. 5. That it shall be the duty of the owner or owners of a railroad or steamboat, by their agents or managers, to provide for the redemption of the whole, or any parts or coupons of any ticket or tickets, as they may have sold, as the purchaser, for any

reason, has not used, and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used; and the sale by any person of the unused portion of any ticket, otherwise than by the presentation of the same for redemption, as provided for in this section, shall be deemed to be a violation of the provisions of this act, and shall be punished as is hereinbefore provided; provided, that this act shall not prohibit any person who has purchased a ticket from any agent authorized by this act, with the bona fide intention of traveling upon the same, from selling any part of the same to any other person.

“Sec. 6. Any railroad or steamboat company that shall, by any of its ticket agents in this state, refuse to redeem any of its tickets or parts of tickets as prescribed in section 5 of this act shall pay a fine of five hundred dollars for each offense, to the people of the state of Illinois, and it shall be unlawful for said company, subsequent to such refusal, to sell any ticket or tickets in this state until such fine is paid.” 2 Starr & C. St. 1951.

The defendant, before pleading to the indictment, moved to quash it, upon the alleged ground that said act was in contravention of the Constitutions of the United States and of the state of Illinois; but said motion was overruled, and exception taken. The court refused to give for the defendant an instruction to the effect that said act was in contravention of said Constitutions, and, therefore, void, to which refusal defendant excepted. The jury found the defendant guilty. Motions for new trial and in arrest of judgment were overruled, to which exception was taken; and judgment was entered upon the verdict, fining defendant \$500, to which, also, exception was taken. The subject presented for consideration is the constitutionality of the above act, and we will consider the objections to its validity in the order in which they are presented by the counsel for plaintiff in error in their brief.

1. It is contended that the act violates section 2 of article 2 of the Constitution of Illinois, which provides that “no person shall be deprived of life, liberty or property without due process of law,” and that it also violates the provisions of a similar character in the Federal Constitution. Const. U. S. arts. 5, 14, Amend. (1 Starr & C. St. 36, 38, 39). The position of counsel is that, when

a man purchases tickets or other certificates entitling the holder to travel upon any railroad, etc., as stated in the act, such tickets are his property, and that the legislature has no authority to pass an act depriving the holder of such property of the right to sell it to whom he pleases. The Constitution does not say that the disposition of property may not be limited or regulated when the interests of the public so require, but that no person shall be "deprived" of his property without due process of law. The phrase "due process of law" is the equivalent of the words "law of the land," as used in Magna Charta, and means "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." Board of Ed. v. Bakewell, 122 Ill. 329; 10 N. E. Rep. 378; Rhinehart v. Schuyler, 2 Gilman, 473; Davidson v. New Orleans, 96 U. S. 97; Cooley Const. Lim. (5th ed.) marg. p. 356, top p. 435. An act of the legislature is not necessarily the "law of the land." A state cannot make anything "due process of law" which, by its own legislation, it declares to be such. An act of the legislature which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power, because, if effectual, it operates to deprive a man of his property without "due process of law." Davidson v. New Orleans, supra; Taylor v. Porter, 4 Hill, 140; Rohn v. Harris, 130 Ill. 525; 22 N. E. Rep. 587; Ervine's Appeal, 16 Penn. St. 256; Hoke v. Henderson, 4 Dev. 1. If, therefore, the above act of 1875 operates to deprive the holder of a legally-purchased ticket of his property rights therein, it must be declared to be void. But, upon turning to section 5 of the act, we find that it authorizes the original purchaser of a ticket from an authorized agent to resell the whole or any unused part of such ticket to the owner of the railroad or steamboat who sold it to him, or to sell any part of it to any other person, if the original purchase of it from the agent was with the bona fide intention of traveling upon it. The purchaser is entitled to have his ticket redeemed by the railroad or steamboat owner at a rate fixed by the terms of section 5, but his right of sale is not even limited to such owner, provided, only, his purchase was made in the mode and for the purpose stated in the proviso to the section. In view of the provisions contained in sections 5 and 6, we fail

to see how the owner of the ticket is deprived of his property in it. His ticket is not destroyed, nor is there any serious limitation upon his use of it. The design of the act, as stated in its title, is to prevent frauds upon travelers and owners of railroads, steamboats and other conveyances for the transportation of passengers. The business of a common carrier is a public employment. The franchises of railroads acting under charters or acts of incorporation are of a public nature, so far as the safety, convenience and comfort of passengers are concerned. Reasonable regulations affecting the conduct of such public employments are fit subjects for legislative action. The lawmaking power may provide means for remedying such evils as, in its opinion, may exist in the management of these public agencies of transportation; and in doing so it may sometimes impose restrictions, which are deemed to be necessary, upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him, so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property whose use and enjoyment are so limited, is invested in a business affected with a public use, or is used as an accessory in carrying on such business. *Munn v. People*, 69 Ill. 80; *Com. v. Wilson*, 14 Phila. 384. We are, therefore, of the opinion that the act under consideration does not violate section 2 of the bill of rights.

2. The act is alleged to contravene the provisions of the Federal and State Constitutions which forbid the passage of laws impairing the obligation of contracts. Const. U. S. art. 1, § 10; Const. Ill. art. 2, § 14; 1 Starr & C. St. 31, 105. The tickets proven to have been sold by the plaintiff in error contain only the name of the railroad company, the words "Cairo to Chicago," the signature of the general ticket agent, and certain figures or numbers. It has been held that such a ticket is not a contract, but merely the evidence of a contract, or a mere receipt taken or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another. *Logan v. Railway Co.*, 12 Am. & Eng. R. Cas. 141; 2 Redf. R. R. (6th ed.) 303; *Ray Neg. Imp. Dut.* 495; *Com. v. Wilson*, supra. But, if it be admitted that the ticket is a contract, the statute would only be inoperative and of no effect as to contracts existing at the time of

its passage. It would be valid and constitutional as to future contracts. It cannot be said that the act of 1875 impaired the obligation of any contract connected with the tickets upon the sale of which the present indictment is predicated. The tickets sold by plaintiff in error were issued by the railroad company in 1893 — eighteen years after the passage of the act. The plaintiff in error must be presumed to have known that the sales of the tickets by him were criminal acts. *Fry v. State*, 63 Ind. 552; *Com. v. Wilson*, *supra*.

3. The act is charged with contravening the 3d clause of section 8 of article 1 of the Federal Constitution, which confers upon congress the power to regulate commerce among the several states. 1 Starr & C. St. 30. In the present case the tickets sold only entitled the holder to travel between points located wholly within the state of Illinois. But the portion of the act upon which the present objection is founded is the prohibition contained in the 2d section, against the sale of tickets entitling the holder to travel on any railroad or steamboat, "whether the same be situated, operated or owned within or without the limits of this state." It is held by the Supreme Court of the United States that interstate commerce, the regulation of which is within the exclusive power of congress, includes interstate transportation of passengers. But the deposit in congress of the power to regulate commerce between the states was not intended to deprive the states of their police power. Under its police power, a state may legislate to promote domestic order, morals and safety; to protect the lives, limbs, quiet and property of all persons within the state; to secure the general comfort, health and property of the state; to prevent crime, pauperism, disturbance of the peace, and all forms of social evils. The state cannot invade the domain of the national government, or assume powers properly belonging to congress. In relation to the subject of commerce, including interstate passenger travel, the state cannot place any obstacle in the way of the travel, or impose any burden upon it. But many acts of a state may affect or influence commerce without amounting to a regulation of it. State legislation, which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional, as

infringing upon the powers of congress. The act of 1875 is, we think, such a species of state legislation. The duties which it imposes upon the carriers therein named, and their agents, cannot interfere with the freedom of interstate travel. Such travel is not impeded because tickets are required to be purchased from agents of the carrier who are provided with certificates of their authority. The limitation of the sale of tickets to such agents may be a restraint upon the business of scalpers and ticket brokers, but cannot be regarded as a burden upon interstate commerce. If the body of the act of 1875 be read in connection with its title, it must have been the opinion of the legislature that the restriction of sales of tickets to authorized agents was necessary to prevent frauds upon travelers and carriers, and to remedy the evils growing out of the practices of scalpers and ticket brokers, as described by Mr. Ray in his work on Negligence of Imposed Duties, Passenger Carriers (at pages from 491 to 498 inclusive). Viewed in this light, the act in question amounts to nothing more than the regulation of a public employment under the police power of the state. The business of the carrier being a proper subject for the exercise of the police power, its necessary incidents and adjuncts are also subject thereto. As the issuing and use of tickets are required in such business, their sale is an incident thereof, and may be regulated by legislative action. It is the province of the legislature to determine the nature and character of such regulations, and the judiciary is not called upon to consider whether they are wise or unwise. The views herein expressed are sustained by the following authorities: *Fry v. State*, supra; *Com. v. Wilson*, supra; *People v. Walser*, 11 Leg. News, 12; *Railroad Co. v. Husen*, 95 U. S. 465; *Patterson v. Kentucky*, 97 U. S. 501; *Cooley Const. Lim.* (5th ed.) marg. pp. 574, 597. We do not think that the act violates the constitutional provision conferring upon congress the power to regulate interstate commerce.

4. It is claimed that the act violates that part of section 22 of article 4 of the Constitution of Illinois which provides that the general assembly shall not pass special laws "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." 1 Starr & C. St. 119, 120.

Counsel contend that by the terms of the act a certain class of persons, namely, railroad ticket agents, are permitted to sell tickets, and are thereby granted a special privilege. We do not think that there is any force in this contention. It is disposed of by what has already been said in regard to the validity of the act as an exercise of the police power of the state. The requirement that tickets shall only be sold by agents authorized so to do is merely a police regulation as to the manner in which the business of the carrier shall be conducted. From the nature of things, only common carriers can, in the first instance, issue or sell tickets for passage in their own conveyances or over their own lines. They have no more a monopoly of the ticket business than a manufacturer has of the articles which he manufactures. The authority to the agent is not an authority to sell tickets generally for all other carriers, but only to sell them for the particular carrier providing the certificate of authority. The act would seem to impose upon the carrier a burden, and not to grant a privilege or immunity, as the repurchase of unused tickets is required; and, in order to prevent frauds, the sale of tickets can only be made through agents authorized to sell in the particular mode designated by the statute. Substantially the same phraseology continues in section 1 of the present act, to which counsel object as amounting to special legislation, is to be found in an act passed by the legislature of Indiana, which was upheld by the Supreme Court of that state as being consistent with a constitutional requirement forbidding the legislative grant of exclusive privileges or immunities to any citizen or class of citizens. *Fry v. State*, supra. We see no good reason for adopting a different conclusion. Nor can it be said that the law abridges "the privileges or immunities of citizens of the United States." Const. U. S. § 1, art. 14, Amend. (1 Starr & C. St. p. 38). The privileges or immunities referred to in the fourteenth amendment of the Federal Constitution are those which are fundamental, such as "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." No privilege or immunity of the plaintiff in error has been abridged by the act of 1875. The

right of conducting the business of selling railroad and steamboat tickets is curtailed and hedged about by certain restrictions, which the legislature deemed necessary to prevent frauds upon travelers and public carriers. But these restrictions amount only to "such restraints as the government may justly prescribe for the general good of the whole." *Corfield v. Coryell*, 4 Wash. C. C. 371; Fed. Cas. No. 3,230; *Slaughterhouse cases*, 16 Wall. 36.

In the case at bar our conclusion is that the statute of this state, above quoted, is not in conflict with the Federal Constitution, or with the Constitution of the state, but was a legitimate exercise by the legislature of the police powers of the state. Accordingly, we hold that no error was committed by the court below in its rulings above indicated. The judgment of the Circuit Court is affirmed. Affirmed.*

Laws to regulate the sale of tickets by common carriers and to prevent ticket brokerage or ticket scalping.—The validity of the Illinois act, passed upon in the principal case, was sustained by McALLISTER and MOORE, JJ., in *People v. Walser*, 11 Leg. News, 12. Similar acts have been upheld in the following cases: *Fry v. State*, 63 Ind. 553; *State v. Fry*, 81 Ind. 7; *Commonwealth v. Wilson*, 14 Phila. 384; 27 Leg. Int. 484; 56 Am. & Eng. R. Cas. 230; *State v. Corbett*, (Minn.) 59 N. W. Rep. 817.

The act passed upon in the Minnesota case differs somewhat from the Illinois act. Section 1 of the act provides that the owners of any railroad or steamboat for the transportation of passengers shall provide each agent who may be authorized to sell within the state tickets for passage with a certificate setting forth his authority; that such agent shall also procure a license from the secretary of state authorizing him to sell the tickets of such carrier, and that he shall keep both the certificate and license posted in a conspicuous place in his office.

Section 2 prohibits any person not having such certificate and license from selling, bartering or transferring any ticket or part of ticket for passage on any railroad or steamboat, whether the same be situated or operated within or without the state.

Section 3 provides a penalty for a violation of section 2.

Section 5 requires the owners of railroads and steamboats to redeem, upon demand, any unused ticket, coupon or part of ticket, and prohibits the sale of any such unused tickets or parts of tickets under a penalty.

The objections made to the validity of the act were stated by the court as follows: (1) It is "class" legislation, in that it gives to persons named by the carriers the exclusive privilege of conducting the business of dealing in transportation tickets. (2) It delegates to the carriers the police power of licensing

* Reported in 149 Ill. 600; 36 N. E. Rep. 948.

persons to conduct the business of dealing in such tickets. (8) It deprives the citizen of his property in such tickets without due process of law. (4) It is an unlawful interference with interstate commerce. (5) It discriminates between incorporated and unincorporated carriers of passengers, because section 7 imposes a penalty on the former and not on the latter for refusing to redeem unused tickets.

The court disposes of these objections as follows: "It seems to us that most of the objections to the act — certainly the first two — are based upon a radical misconception of its provisions, and of the character of transportation tickets as property. Counsel for the defendant seems to assume — First, that such tickets are vendible chattel property, which are the legitimate subject of barter and sale, the same as any other chattels, and, second, that this statute is designed to be a 'license law,' in the ordinary sense of that term. With these two premises assumed, the task of successfully assailing the validity of the act is a very easy one. While a 'railroad ticket' is, in one sense, 'property,' yet it is not merchandise or a chattel. It is merely the evidence of the contract of the carrier to transport the holder between the points, and on the conditions, therein named. Treating it as the contract itself, it is in the nature of a chose in action. No one with whom a carrier makes such a contract has any inherent constitutional right to insist that it should be assignable. At common law, all choses in action were nonassignable, and if the legislature had deemed it necessary, in order to prevent the supposed evils, to provide that all transportation tickets should be nontransferable, or even to prohibit the issue of tickets altogether, and require carriers of passengers to collect fare in cash, we fail to see why they had not the power to do so.

"Again, the act has not the first element of a 'license law' in the common meaning of the term. It must be borne in mind that these tickets are the contracts, or evidences of the contracts, of the carriers, and hence, in the nature of things, can in the first instance be issued or sold only by the carriers themselves, who, as a matter of course, have the exclusive right to appoint their own agents for that purpose. Now, what the act provides is that the carriers shall only issue or sell their tickets through agents appointed in a particular manner, and the evidence of whose appointment has been authenticated by certain formalities. While the certificate of a compliance with these requirements, issued by the state, is called a 'license,' yet it is merely the evidence of the appointment of the agent, its purpose being to secure and preserve public written evidence of that fact, so as to prevent evasions of the law, and to enable every one who buys a ticket to ascertain whether the person with whom he is dealing actually represents, and has authority, to bind the carrier. The agent is given no authority to sell or deal in tickets of other carriers, but only authority to sell the tickets of the carrier appointing him, and providing him the certificate of such authority. So far from granting any special privileges to the carrier, it imposes a burden upon him — First, by limiting his right to issue or sell tickets to agents provided with a certificate from the state of their authority; and, second, by requiring him to repurchase or redeem unused tickets. And then, in order to prevent the frauds already referred to, the act prohibits entirely the sale, barter or transfer, within the state, of the whole or any part of any ticket, or other evidence of the holder's right to travel on any

railroad or steamboat, whether situated or operated within or without the state, except by the agent of the carrier possessing the certificate of authority provided for in the first section of the act.

“The fact that the purchaser of a ticket is prohibited from selling it to whom he pleases does not ‘deprive him of his property without due process of law.’ The disposition of property may always be limited or regulated where public interests so require. The ticket is not destroyed or taken from the holder, nor is his right to ride on it at all limited. The only limitation is upon his right to transfer it. If he wishes to ride on it, which is the purpose for which a ticket is presumably bought, he can do so; but, if he does not use it, his only course is to require the carrier who issued it to redeem it. As already suggested, a man has no constitutional right to insist that these contracts for transportation shall be transferable; and if the legislature had seen fit to declare that they should not be, and that they could only be used by the party to whom they were originally issued, they might have done so, even without making any provision at all for their redemption by the carrier if not used. This might not be true as to tickets, by their expressed or implied terms transferable, purchased before the passage of the act; but as to the tickets issued and purchased after that it is unquestionably true, for the statute becomes a part of the contract expressed in the ticket, and is inherent in the property in it. *Ogden v. Saunders*, 12 Wheat. 213.

“The indictment in this case charges defendant with selling the ticket nearly six months after the passage of the act, and, if the law should be regarded as invalid as to tickets issued and purchased before it was passed, it was for the defendant to plead and prove that he comes within the class of persons as to which the law is invalid, and that this ticket was one as to which the statute does not operate. A law may be entirely valid as to some persons and some acts, and invalid as to others, and its invalidity can be raised and taken advantage of only by those who show that they have a right to question the act. They must show that their rights are taken away by the law, and that as to them, in the particular case, there is a higher law in the Constitution which supersedes the statute. In Indiana and Illinois the courts have upheld statutes similar to the one under consideration in all material respects, except that they provide that the acts shall not prohibit any person who has purchased a ticket from any agent authorized as by the act provided, with the bona fide intention of traveling upon the same, from selling it to any other person. *Fry v. State*, 63 Ind. 552; *Burdick v. People*, (Ill. Sup.) 36 N. E. Rep. 948. In these cases the courts lay some stress upon this provision. But we are unable to see how the absence of it affects the validity of the act, or how, at least as to tickets issued after its passage, it deprives a person of his property ‘without due process of law.’ The law may in that respect be more drastic; but if the legislature thought that such an exception would open the door to evasions of the law, and that the evils aimed at could be effectually remedied only by absolutely prohibiting any sale of tickets within the state except by the carrier himself, through his agents authorized in the manner provided, we think it was competent for them to so declare.

“Neither is there anything in the objection that, while the act prohibits the sale of any tickets except in the manner prescribed, it only provides for the

redemption of unused tickets of railroads or steamboats situated or operated, in whole or in part, within the state. The limitation of the provisions as to redemption may have been because of the supposed inability of the state to compel redemption by foreign or nonresident steamboat or railway companies; but, as the sale of all tickets might have been prohibited without any provision for their redemption, the act does not deprive the holder of a ticket of a nonresident carrier simply because it leaves him, in case he does not use it, to such remedies, if any, as may be given him by the law of the domicile of the carrier. It is hardly necessary to suggest that it is just as necessary, in order to prevent frauds on the public, to regulate the sale, within the state, of tickets of 'nonresident' carriers as of 'resident' ones. We may add, in passing, that section 5 of the act makes it the duty of a carrier within the state to redeem tickets sold by it in 'any manner,' no matter whether sold within or without the state; also, that the word 'owners' is evidently used in a comprehensive sense, so as to include all who are operating a railroad or steamboat, whether as owners of the property, or as lessees, receivers or the like. What has been said fully covers the first three objections to the statute.

"There is clearly nothing in the objection that the act unlawfully interferes with interstate commerce. In the first place, the question is not in this case, because the ticket is not for an interstate ride. But, even if it was, there would be nothing in the point. The law is not a revenue law, and is not designed to, and does not, regulate interstate commerce at all. It is a mere police regulation of the sale and transfer of tickets, designed to protect the public from frauds, and its interference, if any, with interstate commerce, is purely incidental and accidental. The grant of power to congress to regulate interstate commerce was never designed to, and does not, at all interfere with police power of the states to promote domestic order, to prevent crime and to protect the lives and property of its citizens, although such regulations may indirectly operate upon and affect interstate commerce. Such regulations are valid in spite of their operation on commerce, and the right to pass them does not originate from any power in the state to regulate commerce. The books are so full of cases to this effect that the citation of authorities in support of the proposition is unnecessary.

"Neither is there anything in the last objection. If defendant is correct in his construction of section 7, that it only imposes a penalty, in favor of the state, upon incorporated carriers for a refusal to redeem unused tickets, this is not an objection which he is in position to raise, as it does not affect him. If any owner of a railroad or steamboat situated or operated, in whole or in part, within the state, refuses to redeem his ticket, as provided in section 5, the purchaser has his civil remedy, wholly independently of section 7. Even if the latter section should be declared wholly invalid, on the objection of an incorporated carrier, it would not affect the validity of the balance of the act."

In *State v. Ray*, 109 N. C. 736; 14 N. E. Rep. 83, and *State v. Clark*, 109 N. C. 739; 14 S. E. Rep. 84, it was held that the statute of that state which makes it unlawful "for any person to sell or deal in tickets issued by any railroad company unless he is a duly authorized agent of said railroad company," was not violated by the sale of a single ticket, and that an indictment which merely charged the sale of a single ticket did not set forth the offense defined

in the act. The court said : "The important words that limit and define the grievance thus prohibited, are 'to sell or deal in tickets issued by any railroad company.' These words imply not simply the sale of a single such ticket as a person may have or obtain not of purpose to sell the same, but the practice or business of selling such tickets for others, or buying and selling them as is ordinarily done by 'ticket dealers or ticket brokers.'"

For some correspondence and opinions upon the subject of ticket brokerage, see Report of Interstate Commerce Commission, 1890, 865-876.

MISSOURI PAC. RY. CO. v. McFADDEN ET AL.

(Supreme Court of the United States, May 26, 1894.)

1. CARRIERS. BILL OF LADING. NEGOTIABILITY. A bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignors thereof the rights of the holder of such paper.

2. LIABILITY UPON BILL OF LADING ISSUED BEFORE RECEIPT OF THE GOODS, WHEN THE GOODS ARE NEVER IN FACT RECEIVED. BONA FIDE HOLDER. Where bills of lading were issued for cotton which, pursuant to agreement and the course of dealing between the carrier and shipper, remained in the possession of a compress company, as agent of the shipper, to be compressed for the shipper's account, and was destroyed by fire before delivery to the carrier, held, that the carrier was not liable for the loss, by reason of the bills of lading, either to the shipper or to an assignee of the bills of lading, who received the same without notice of such an agreement and course of dealing.

THIS was an action by George H. McFadden, John H. McFadden and Franklin McFadden, composing the firm of George H. McFadden & Bro., against the Missouri Pacific Railway Company, for the loss of certain cotton. On submission of the case without a jury, the Circuit Court rendered judgment for plaintiffs. Defendant brought error.

The defendants in error (plaintiffs below) sued in the Circuit Court of Hunt county, Texas, to recover the value of 200 bales of cotton, alleged to have been shipped from Greenville, Texas, to Liverpool, England, the shipments having been evidenced by two bills of lading, each for 100 bales of cotton.

On application of the defendant below, the case was removed to the Circuit Court of the United States for the northern district of Texas. After filing the record in that court, the pleadings were amended. The amended answer set up the following, among other, special defenses on behalf of the company :

“First. That, while it is true that it had issued certain bills of lading for said cotton, said cotton had not yet, in deed and in truth, been delivered to it. It was the habit and the custom of defendant, and well known to plaintiffs to be such, after cottons were placed on the platforms at the compress in Greenville, before the same was compressed, it would issue bills of lading therefor to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that, at the time they were so delivered to it, the superintendent of the compress, or the agent of the compress, would check out such cottons intended, and the shipper would make out a bill of lading, which would be O. K.’d by the superintendent of the compress or its agent, and afterwards it would be brought to the agent of the defendant, and by him signed up, and defendant would actually receive said cotton only after it was compressed and delivered upon its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended, by either the shipper or the defendant, that the liability of the defendant should attach until the cotton was actually delivered upon its cars. This custom was well known to the plaintiffs, George H. McFadden & Bro., and to A. Fulton & Co., and the bills of lading were made out, according to this custom, by A. Fulton & Co., as herein shown, and accepted by A. Fulton & Co. according to such custom. At the time said bills of lading were made, the cotton was in the hands of the compress, according to the custom aforesaid, and had never been delivered to defendant, the defendant’s liability as a common carrier had never attached, nor had any liability attached; but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire, and never came to the hands of defendant. Defendant says said cotton was placed on said platform at said compress for the purpose of being compressed by A. Fulton & Co.; that they well knew, intended and expected said cotton should be compressed before it was shipped. Said cotton, while at the compress, was under the control of A. Fulton & Co. or their agent, the compress company.”

The answer thereupon proceeded to set out other matters, to which it is unnecessary to refer.

The plaintiff replied to the amended answer, and excepted to the first count as follows :

“ And they specially except to the first count in defendant’s special answer, in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing.”

The reply then proceeded to except to other parts of the defendant’s answer.

The court sustained the plaintiff’s exception to the first count of the amended answer, to which ruling exception was reserved. Thereupon the facts were stated to be — First, that the bills of lading had been issued to Fulton & Co. ; second, that they were assigned to the plaintiffs ; third, that the value of the cotton was \$8,647.83 at the time it was destroyed, and that the defendant had never paid therefor.

! Upon this evidence, the case was submitted to the court without a jury, and the court found for the plaintiffs, and gave judgment for the value of the cotton. The case is brought here by writ of error.

James Hagerman, for plaintiff in error. *Geo. Wharton Pepper* and *J. Bayard Henry*, for defendants in error.

WHITE, J. (*after stating the facts*). Many questions were discussed at bar which we deem it unnecessary to notice, as we consider that the whole case depends upon the correctness of the judgment of the court below in sustaining the exception to the first defense in the amended answer. That defense averred that the cottons for which the bills of lading were issued were never delivered to the carrier ; that, by a custom or course of dealing between the carrier and the shipper, it was understood by both parties that the cotton was not to be delivered at the time the bills of lading were issued, but was then in the hands of a compress company, which compress company was the agent of the

shipper; and that it was the intention of the parties, at the time the bills of lading were issued, that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed, and that this custom was known to the plaintiffs and transferees of the bills of lading; and that, while the cotton was so in the hands of the compress company, the agent of the shipper, and before delivery to the carrier, it was destroyed by fire.

All of these allegations in the answer were, of course, admitted by the exception, and, therefore, the case presents the simple question of whether a carrier is liable on a bill of lading for property which, at the time of the signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text books: "The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage." Redf. Carr. 80. "The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods; it must rest entirely upon the one or the other; and, until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them." Hutch. Carr. 82.

This doctrine is sanctioned by a unanimous course of English and American decisions. *The Freeman v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *The Delaware*, 14 Wall. 579; *Pollard v. Vinton*, 105 U. S. 7; *Railway Co. v. Knight*, 122 U. S. 79; 7 Sup. Ct. Rep. 1132; *Friedlander v. Railway Co.*, 130 U. S. 423; 9 Sup. Ct. Rep. 570; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 239; 11 Sup. Ct. Rep. 554; *Barron v. Eldredge*, 100 Mass. 455; *Moses v. Railroad Co.*, 4 Fost. (N. H.) 71; *Brind v. Dale*, 8 Car. & P. 207; *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Camp. 414; *Leigh v. Smith*, 1 Car. & P. 638; *Grant v. Norway*, 10 C.

B. 665; Hubbersty v. Ward, 8 Exch. 331; Coleman v. Riches, 29 C. B. 323. Indeed, the citations might be multiplied indefinitely.

While the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill.

Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver, but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods, until then, shall remain in the custody of the shipper. Does the fact that the plaintiffs claim to be assignees of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier confer upon them greater rights, as against the carrier, than those which attach under the bill of lading in the hands of the parties to whom it was originally issued and who made the agreement?

It is to be remarked, in considering this question, that the averment of the answer, which was admitted by the exception, charged that the course of dealing between the parties, in accordance with which the goods were not delivered up at the time of the issuance of the bills of lading, but remained in the hands of the compress company, which was the agent of the shipper, was known to the plaintiffs, the holders of the bills of lading. It is clear that, whatever may be the effect of custom and course of dealing upon the question of legal liability, proof of such custom and course of dealing would have been admissible, not in order to change the law, but for the purpose of charging the plaintiffs, as holders of the bills of lading, with knowledge of the relations between the parties.

That a bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignees thereof the rights of the holder of such paper, is well settled. Said this court in *Pollard v. Vinton*, *supra*.

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by

judicial decision. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense.

"It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter, it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or to deliver." See *The Lady Franklin*, 8 Wall. 325.

The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this court expressed surprise that the question should be raised. These views coincide with the rulings of the English courts. The cases of *Grant v. Norway*, 10 C. B. 665, and *Hubbersty v. Ward*, 8 Exch. 330, 331, were both cases where bills of lading were issued and held by third parties. The rule was uniform in England until the passage of the Bills of Lading Act (18 & 19 Vict. chap. 111, § 3), making bills of lading in the hands of consignees or indorsees for value conclusive as to shipment.

Under these elementary principles we think there was manifest error below in maintaining the exception to the first count in the amended answer. Of course, in so concluding we proceed solely upon the admission which the exception to the answer necessarily imported, and express no opinion as to what would be the rule of law if the compress company had not been the agent of the shipper, or if the goods had been constructively delivered to the carrier through the compress company, who held them in the carrier's behalf.

The judgment is reversed, and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice JACKSON, not having heard the argument, took no part in the decision of this case.*

Bills of lading — effect of, in hands of bona fide holder when issued for goods not received. — Whether a bill of lading acknowledging the receipt of goods, will estop the carrier from disputing the fact of such receipt, as against a bona fide holder of the bill for value, is a question upon which the authorities are divided. The following hold that the carrier is not estopped: *Pollard v. Vinton*, 105 U. S. 7; *Friedlander v. Railway Co.*, 130 U. S. 416; *Second National Bank v. Walbridge*, 19 Ohio St. 419; *Williams v. Wilmington, etc., R. Co.*, 98 N. C. 42; *National Bank of Commerce v. Chicago B. & N. R. Co.*, 44 Minn. 224; 46 N. W. Rep. 342, 560. To the contrary are: *Batavia Bank v. New York, L. E. & W. R. Co.*, 106 N. Y. 195; *Brooks v. New York & C. R. Co.*, 108 Penn. St. 529; *Sioux City R. Co. v. Bank*, 10 Neb. 556; *Savings Bank v. Railroad Co.*, 20 Kans. 519; *Railroad Co. v. Larned*, 103 Ill. 293. See, generally, *Hutchinson Carr.* § 124; *Mechem Agency*, § 717; 8 Am. R. R. & Corp. Rep. 41, 42.

INTERSTATE COMMERCE COMMISSION v. BRIMSON ET AL.

(Supreme Court of the United States, May 26, 1894.)

1. **CONSTITUTIONAL LAW. VALIDITY OF ACT AUTHORIZING UNITED STATES CIRCUIT COURT TO COMPEL ATTENDANCE OF WITNESSES BEFORE INTERSTATE COMMERCE COMMISSION.** The provision of section 12 of the Interstate Commerce Act authorizing Circuit Courts, on refusal of any person to obey a subpoena issued by the interstate commerce commission, to order such person to appear before the commission and give evidence, failure to obey such order to be punishable by the court as a contempt thereof, is not unconstitutional, as imposing on the courts functions not judicial in their nature; for such direct proceeding against the witness is a case or controversy within the judicial power of the United States under the Constitution, of which Circuit Courts, under the laws establishing them, are competent to take jurisdiction, being judicial in form and instituted for the determination of distinct issues between the parties, and being not merely ancillary and advisory, but a proceeding in which a judgment may be rendered that will be conclusive on the parties until reversed, and that may be enforced by process of the Circuit Court.

2. Such provision is not in derogation of the fundamental guaranties of personal rights recognized by the Constitution as interfering with the freedom of the citizen, for the witness may avail himself of their protection in the proceeding to compel his attendance.

* Reported in 154 U. S. 155; 14 Sup. Ct. Rep. 990.

8. The provision is not invalid because a trial by jury is not accorded, for the issue is one of law, and, in matters of contempt, a jury is not required by due process of law.

THIS was a petition by the interstate commerce commission for an order requiring W. G. Brimson, J. S. Keefe and W. R. Sterling to appear before the commission and answer certain questions, and requiring Keefe and Sterling to produce before the commission certain books. The Circuit Court dismissed the petition. 53 Fed. Rep. 476. The commission appealed.

Solicitor-General Maxwell and George F. Edmunds, for appellant. *E. Parmelee Prentice, Charles S. Holt and J. C. Hutchins*, for appellees.

HARLAN, J. This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the interstate commerce commission, under the act of congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, chap. 104; 25 Stat. 855, chap. 382; 26 Stat. 743, chap. 128; 1 Supp. Rev. St. 529, 684, 891.

The petition was based on the 12th section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books and papers.

The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. Rep. 476, 480.

The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing or handling of property wholly within one state, and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory; but they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are

used, under a common control, management or agreement, for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "railroad," as used in the act, includes all bridges and ferries used and operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" includes all instrumentalities of shipment or carriage.

All charges made for services rendered or to be rendered in the transportation of passengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. § 1.

Any carrier subject to the provisions of the act, directly or indirectly, by special rate, rebate, drawback or other device, charging, demanding, collecting or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property than it charges, demands, collects or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the act expressly declares to be unlawful. § 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to any particular description of traffic, or to subject any particular person, com-

pany, firm, corporation or locality, or any particular kind of traffic, to undue or unreasonable prejudice or disadvantage in any respect; and carriers subject to the provisions of the act are required to afford, according to their respective powers, all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines; but this regulation does not require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. § 3.

It is made unlawful for any carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this does not authorize the charging and receiving as great compensation for a short as for a longer distance. Upon application to the commission the carrier may, in special cases, after investigation by that body, be authorized to charge less for longer than for short distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which the carrier may be relieved from the operation of this section. § 4.

It is also made unlawful for any carrier subject to the provisions of the act to enter into any contract, agreement or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and, in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance is deemed a separate offense. § 5.

Another section of the act provides for the printing and posting by carriers of their rates, fares and charges for the transportation of passengers and property, including terminal charges, classifications of freight, and any rules or regulations affecting such rates, fares and charges, including the rates established and charged

for freight received in this country to be carried through a foreign country to any place in the United States; forbids any advance or reduction in such rates, fares and charges, so established and published, except upon public notice, of which changes the commission shall be notified; requires every carrier to file with the commission copies of all contracts, agreements or arrangements, with other carriers relating to any traffic affected by the provisions of the act, as well as copies of schedules of joint tariffs of rates, fares or charges for passengers and property over continuous lines or routes operated by more than one carrier; declares it to be unlawful for any carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon, than is specified in the schedule filed with the commission in force at the time; authorizes, in addition to the penalties prescribed for neglect or refusal to file or publish rates, fares and charges, a writ of mandamus to be issued by any Circuit Court of the United States in the judicial district wherein the principal office of the carrier is situated, or wherein such offense may be committed, and, if such carrier be a foreign corporation, in the judicial circuit wherein it accepts traffic and has an agent to perform such service, to compel compliance with the above provisions of the section relating to schedules of rates, fares and charges, such writ to issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of the act, and the failure to comply with its requirements being punishable as and for a contempt; and empowers the commissioners, as complainants, to apply in any such Circuit Court of the United States for a writ of injunction against the carrier to restrain it from receiving or transporting property among the several states and territories of the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the 1st section of the act, until the carrier shall have complied with the provisions last referred to. § 6.

So a common carrier subject to the provisions of the act is forbidden to enter into any combination, contract or agreement,

expressed or implied, to prevent, by change of time schedule, carriage in different cars, by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of the act. § 7.

By the 11th section a commission is created and established, to be known as the "interstate commerce commission," and to be composed of five commissioners, appointed by the president, by and with the advice and consent of the senate. § 11.

Other sections give a right of action to the persons injured by the acts of carriers done in violation of the statute, prescribe penalties against carriers for illegal exactions and discriminations, and indicate how the provisions of the statute may be enforced against carriers by the commission.

The 12th section (26 Stat. 743, chap. 128), the validity of certain parts of which is involved in this proceeding, provides as follows:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute, in the proper court and to prosecute under the direction of the attorney-general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the

appropriation for the expenses of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation.

“Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this section.

“And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

“The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a Circuit, or any clerk of a District or Circuit Court, or any chancellor, justice or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a County Court, or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the

parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

“Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

“If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing, to be filed with commission. All depositions must be promptly filed with the commission.

“Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.” § 12.

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause :

Prior to the 14th of June, 1892, informal complaint was made to the interstate commerce commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet and Blue Island Railroad Company, the Chicago and Southeastern Railway Company of Illinois, the Joliet and Blue Island Railway Company and the Chicago and Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago and Joliet, respectively, and engaging in traffic by a continuous shipment

from cities and places without to cities and places within Illinois, in connection, respectively, with the Baltimore and Ohio Railroad Company, the Baltimore and Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Chicago, Rock Island and Pacific Railway Company, the Pittsburg, Ft. Wayne and Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, the Chicago and Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka and Santa Fe Railway Company, the Elgin, Joliet and Eastern Railway Company, the Chicago and Northwestern Railway Company and the Chicago, Milwaukee and St. Paul Railway Company; that it had also caused to be incorporated under the laws of Wisconsin, for the purpose of operating its switches and side tracks at or near Milwaukee, in that state, and engaging in traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, in connection with the Chicago, Milwaukee and St. Paul Railway Company and the Chicago and Northwestern Railway Company, and that said Illinois Steel Company owned and controlled the above-named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named "as a device for the purpose of evading the provisions of the act to regulate commerce, and obtaining special, illegal, unjust and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such manner as to give to the Illinois Steel Company an illegal, undue and unreasonable preference and advantage, subjecting other persons, firms and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the commission that the companies so owned, controlled and operated by the Illinois Steel Company for more than the six months then last past had been and were still engaged in the transportation of property by railroad in connection with the other companies named, "under a common control, management and arrangement for a continuous carriage or

shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies so owned, controlled and operated had filed with the commission copies of their contracts, agreements and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares and charges, as required by the act of congress.

The commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof, with reference as well to the alleged making of illegal, unjust and unreasonable rates as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated, to file with the commission the above contracts, agreements and tariffs.

An order was thereupon made by the commission, which recited the facts of the informal complaint made to it, and required each of the above-mentioned companies to make and file in its office in Washington a full, complete, perfect and specific verified answer, setting forth all the facts in regard to the matters complained of, and responding to the following questions:

"(1) Does any contract, agreement or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement or arrangement.

"(2) Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they, and what are the divisions thereof between the several carriers?

"(3) Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm or company other than the Illinois Steel Company, and, if so, to what amount?

The order further required all of the companies named to appear before the commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet and Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the Interstate Commerce Act, or had resulted in obtaining for the Illinois Steel Company special, illegal, unjust or unreasonable rates in interstate traffic, or in securing to that company illegal, undue or unreasonable preferences.

The commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpoenaed to testify before the commission was William G. Brimson, the president and manager of the five roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching — switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them. Mainly our business is with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business

other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies, with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet and Blue Island Railway Company, but refused, upon the demand of the commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Sterling, first vice-president of the Illinois Steel Company, was also examined as a witness, and, after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the steel company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the commission issued a subpoena duces tecum, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpoena was issued to William R. Sterling, as first vice-president of the steel company, commanding him to appear before the commission and produce the stock books of that company. Keefe and Sterling appeared in answer to the subpoena, but refused to produce the books, or either of them, so ordered to be produced.

The commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition, embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe and Sterling to appear before that

body and answer the several questions propounded by them, and which they had respectively refused to answer, and requiring Keefe and Sterling to appear and produce before the commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe and Sterling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the commission to require the attendance and testimony of witnesses and the production of books, papers and documents, and authorizes the Circuit Court of the United States to order common carriers or persons to appear before the commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the 12th section of the act unconstitutional and void so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Art. 3, § 2), and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by congress (25 Stat. 434, chap. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the interstate commerce commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties, within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." In re Interstate Commerce Commission, 53 Fed. Rep. 476, 480.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the commission, in respect to a matter rightfully committed by congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of congress, in the name of the commission, and under the direction of the attorney-general of the United States, against the witness so refusing to testify, to compel him to give evidence before the commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to congress within much narrower limits than, in our judgment, are warranted by that instrument.

The Constitution expressly confers upon congress the power to regulate commerce with foreign nations, among the several states and with the Indian tribes, and to make all laws necessary and proper for carrying that power into execution. Art. 1, § 8. While the completely internal commerce of a state is reserved to the state itself, because never surrendered to the general government, commerce, the regulation of which is committed by the

Constitution to congress, comprehends traffic, navigation and every species of commercial intercourse or trade between the United States, among the several states and with the Indian tribes. *Gibbons v. Ogden*, 9 Wheat. 1, 193, 194. "It may be doubted," this court has said, "whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown v. Maryland*, 12 Wheat. 419, 446; *Philadelphia & S. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 346; 7 Sup. Ct. Rep. 1118. "In the matter of interstate commerce," this court, speaking by Mr. Justice BRADLEY, has declared, "the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." *Robbins v. Taxing Dist.*, 120 U. S. 489, 494; 7 Sup. Ct. Rep. 592. The same principle was announced by the present chief justice in *Stoutenburgh v. Hennick*, 129 U. S. 141, 148; 9 Sup. Ct. Rep. 256.

What is the nature of the power thus expressly given to congress, and to what extent and under what restrictions may it be constitutionally exerted?

This question was answered when Chief Justice MARSHALL said that it was the power "to prescribe the rule by which commerce is to be governed." "The power," the chief justice continued, "like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single

government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of congress, their identity with the people and the influence which their constituents possess at elections are, in this as in many other instances — as that, for example, of declaring war — the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.” *Gibbons v. Ogden*, 9 Wheat. 1, 189, 196, 197.

Congress thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce among the several states is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular act of congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution?

The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423, it was said: “The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.” Again: “Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.”

Guided by these principles, we proceed to inquire whether the 12th section of the Interstate Commerce Act, so far as it

authorizes the present proceeding, assumes to invest the Circuit Courts of the United States with functions that are not judicial.

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations or preferences, by carriers engaged in interstate commerce, in respect of property or persons transported from one state to another, is a proper regulation of interstate commerce, or that the object that congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same observation may be made in respect to those provisions empowering the commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of congress. It was clearly competent for congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates

of reason, be allowed to select the means ; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." 4 Wheat. 316, 409. The test of the power of congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions. Sinking Fund cases, 99 U. S. 700, 718.

An adjudication that congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty, not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules.

It is to be observed that, independently of any question concerning the nature of the matter under investigation by the commission — however legitimate or however vital to the public interest the inquiry being conducted by that body — the judgment below rests upon the broad ground that no direct proceeding to compel the attendance of a witness before the commission, or to require him to answer questions put to him, or to compel the production of books, documents or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which, under the Constitution, a court of the

United States may take cognizance, even if such proceeding be in form judicial; and the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although, by the established doctrine of the courts a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because, and only because, its road is a public highway, established primarily for the convenience of the people and to subserve public objects and, therefore, subject to governmental control. *Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641, 657; 10 Sup. Ct. Rep. 965.

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made or that shall be made under their authority, this court, speaking by Chief Justice MARSHALL, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States." *Osborn v. Bank*, 9 Wheat. 738, 819. And in *Den ex dem. Murray v. Improvement Co.*, 18 How. 272, 284, Mr. Justice CURTIS, after observing that congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in *Smith v. Adams*, 130 U. S. 173; 9

Sup. Ct. Rep. 566, Mr. Justice FIELD, speaking for the court, said that the terms "cases" and "controversies," in the Constitution, embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an act of congress authorizing the interstate commerce commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements and documents relating to the matter under investigation. The constitutionality of this provision — assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation — is, we repeat, not disputed, and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed, in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the commission imposes upon any one summoned by that body to appear and to testify the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for relate to the matter under investigation, if such matter is one which the commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to congress, are the distinct issues between that

body and the witness. They are issues between the United States and those who dispute the validity of an act of congress and seek to obstruct its enforcement; and those issues, made in the form prescribed by the act of congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by an indictment under an act of congress declaring it to be an offense against the United States for any one to refuse to testify before the commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers and documents. A prosecution for such offense, or a proceeding by information to recover such penalties, would have as its real and ultimate object to compel obedience to the rightful orders of the commission, while it was exerting the powers given to it by congress; and such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it; and the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form and direct in its operation, for the prompt and conclusive determination of this dispute.

As the Circuit Court is competent, under the law by which it was ordained and established, to take jurisdiction of the parties,

and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding, judicial in form and instituted for the determination of distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the commission, except through criminal prosecutions or by civil actions to recover penalties imposed for noncompliance with such orders. But no limitation of that kind upon the power of congress to regulate commerce among the States is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the interstate commission is not calculated to attain the object for which congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the act of congress is clear and strong. *Fletcher v. Peck*, 6 Cranch, 87, 128. In accomplishing the objects of a power granted to it congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of congress. Neither branch of the legislative department, still less any merely administrative body, established by congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S. 168, 190. We said in *Boyd v. U. S.*, 116 U. S. 616, 630; 6 Sup. Ct. Rep. 524 — and it cannot be too often repeated — that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and

its employees of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice FIELD, *In re Pacific Ry. Commission*, 32 Fed. Rep. 241, 250, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

It was said in argument that the 12th section was in derogation of those fundamental guaranties of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties. This court has already spoken fully upon that general subject in *Counselman v. Hitchcock*, 142 U. S. 547; 12 Sup. Ct. Rep. 195. We need not add anything to what has been there said. Suffice it in the present case to say that as the interstate commerce commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him, or that he was not legally bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the commission could have been dismissed upon its merits.

It may be proper to state in this connection that, after the decision in *Counselman v. Hitchcock*, the Interstate Commerce Act was amended by an act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements and documents before the interstate commerce commission, or in obedience to the subpoena of the commission, whether such

subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. 443, chap. 83. But that act was not in force when this case was determined below; nor does it reach the question whether a proceeding like the present one can be maintained in a Circuit Court of the United States.

In the course of the argument at the bar, our attention was called to Hayburn's case, 2 Dall. 409, and *U. S. v. Ferreira*, 13 How. 40, 46, as announcing principles not in harmony with the views we have expressed in this opinion.

Hayburn's case was an application for a mandamus to be directed to the Circuit Court of the United States for the district of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pension list of the United States, in conformity with an act of congress approved March 23, 1792 (Chap. 11), which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and

to regulate claims to invalid pensions. This court took the case under advisement, but, as congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to Hayburn's case, we are informed of the views expressed at the Circuit by different members of this court in relation to the act of 1872. They concurred in holding that it was not in the power of congress to assign to the courts of the United States any duties except such as were properly judicial, and to be performed in a judicial manner; and that the duties assigned to the Circuit Courts were not of that description, and were not contemplated by the act of congress as of that character, and, consequently, that the act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by Chief Justice TANEY, under the direction of this court, and found in 15 Howard, 52, an account is given of Todd's case, which also involved the validity of the act of 1792, so far as it imposed upon the Circuit Courts duties relating to pensions, and it is there stated that Chief Justice JAY and Justice CUSHING, upon further reflection, became satisfied that the power conferred by the act of 1792 on the Circuit Court as a court could not be construed as giving such power to the judges of the court as commissioners.

The same general principles were announced in Ferreira's case, which arose under the treaty of 1819 between Spain and the United States, and under certain acts of congress passed to carry a particular article of that treaty into execution. The case came before this court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want of adjudication in this court raised the question whether the district judge exercised judicial power, strictly speaking, under the Constitution. The motion to dismiss was sustained. Chief Justice TANEY, referring to the statutes under which the district judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice, for there is to be no suit, no

‘parties,’ in the legal acceptance of the term, are to be made, no process to issue, and no one is authorized to appear in behalf of the United States or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the secretary of the treasury, and the claim is to be paid if the secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the act of congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission.” 13 How. 40, 46, 47.

It thus appears that the act of 1792, above referred to, attempted to impose upon the courts of the United States duties purely administrative in their character. So, also, the acts of congress involved in Ferreira’s case conferred no authority upon the district judge to determine finally any questions of a judicial nature, and without requiring any petition to be filed, and without empowering the district attorney to enter an appearance for the United States, so as to make it a party to the proceeding or to authorize a judgment against it, gave that officer the power only of adjusting, without the presence of parties, certain claims, the allowance and payment of which, after being so adjusted, were made to depend wholly upon the discretion of the secretary of the treasury.

Some allusion should be made in this connection to *Gordon v. U. S.*, 117 U. S. 697, and *In re Sanborn*, 148 U. S. 222; 13 Sup. Ct. Rep. 577.

In *Gordon’s* case the question was whether this court had juris-

diction to review the action of the Court of Claims in respect to a claim examined and allowed in the latter court under an act of congress (12 Stat. 765; chap. 92, §§ 5, 7, 14), which, among other things, provided that no money should be paid out of the treasury for any claim passed upon by the Court of Claims until after an appropriation therefor should be estimated by the secretary of the treasury and an appropriation to pay it be made by congress. Under that act, neither the Court of Claims nor this court could do anything more than certify their opinion to the secretary of the treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimate of private claims; and, if he decided in favor of the claimant, it rested with congress to determine whether it would or would not make an appropriation for its payment. Neither the Court of Claims nor this court could, by any process, enforce its judgment; and whether the claim was paid or not did not depend on the decision of either court, but upon the future action of the secretary of the treasury and of congress.

The appeal of Gordon was dismissed, upon the ground that congress could not "authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said Chief Justice TANEY, "is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no 'judgment,' in the legal sense of the term, without it. Without such an award, the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of congress." 117 U. S. 702. See *De Groot v. U. S.*, 5 Wall. 419.

In Sanborn's case, above cited, the same principles were announced. That case arose under an act of congress of March

3, 1887 (24 Stat. 505, chap. 359), one section of which provided that, "when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted." § 12. This court dismissed an appeal from a finding of the Court of Claims, under this act. Referring to the cases of Hayburn, Todd, Ferreira and Gordon, above cited, it observed: "Such a finding is not made obligatory on the department to which it is reported; certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by congress." 148 U. S. 226; 13 Sup. Ct. Rep. 577.

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary doctrine that congress, excluding the special cases provided for in the Constitution — as, for instance, in section 2 of article 2 of that instrument — may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the Circuit Courts of the United States by the 12th section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in

Anderson v. Dunn, 6 Wheat. 204, and in Kilbourn v. Thompson, 103 U. S. 168, 190, of the exercise by either house of congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See Whitcomb's case, 120 Mass. 118, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested (the validity of which is not questioned), of compelling a witness to testify before the interstate commerce commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, congress, in its wisdom, authorizes the commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different

proceeding judicial in form. We could not do so without denying to congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish; namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the Interstate Commerce Act, that provided by the 12th section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in *Gordon's* case, one in which the United States seeks from the Circuit Court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court; and that judgment may be enforced by the process of the Circuit Court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's* case, will be a "final and indisputable basis of action," as between the commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for

the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by congress in execution of a power granted by the Constitution.

This view is illustrated by the case of *Fong Yue Ting v. U. S.*, 149 U. S., 698, 728; 13 Sup. Ct. Rep. 1016, which arose under the act of May 5, 1892 (Chap. 60), prohibiting the coming of Chinese persons into the United States. That act provided for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country, unless such person shall establish, by affirmative proof, to the satisfaction of a justice, judge or commissioner of the United States before whom he might be brought and tried, his lawful right to remain in the United States. It also authorized the arrest of such person by any customs official, collector of internal revenue or United States marshal, and taken before a United States judge. This court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, defendant and a judge; actor reus, et judex. 3 Bl. Comm. 25; *Osborn v. Bank*, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute."

Another suggestion thrown out in argument against the validity of the 12th section of the Interstate Commerce Act, in the particular adverted to, is that the defendants are not accorded a right of trial by jury. If, as we have endeavored to show, this proceeding makes a case or controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to pro-

duce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case the defendant is no more entitled to a jury than is a defendant in a proceeding by a mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law in the Circuit Court is determined adversely to the defendants, and they refuse to obey, not the order of the commission, but the final order of the court; and in matters of contempt a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt, and this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees or commands. Rev. St. § 725; 1 Stat. 83; 4 Stat. 487; *U. S. v. Hudson*, 1 Cranch, 32; *Anderson v. Dunn*, 6 Wheat. 204, 227; *Ex parte Robinson*, 19 Wall, 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303; 9 Sup. Ct. Rep. 77; *Cartwright's case*, 114 Mass. 230, 238. Surely, it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable of right by a jury.

We are of opinion that a judgment of the Circuit Court of the United States determining the issues presented by the petition of the interstate commerce commission and by the answers of the appellees will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. A final order by that court dismissing the petition of the commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting, and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer

the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

In view of the conclusion reached upon the only question determined by the Circuit Court, what judgment shall be here entered? The case was heard below upon the petition of the commission and the answers of the defendants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the Circuit Court, by its judgment, struck down so much of the 12th section as authorized or required the courts to use their process in aid of inquiries before the commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section, in the particular named, is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants, and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. **Reversed.**

FIELD, J., was not present at the argument and took no part in the consideration or decision of this case.

BREWER, J. (dissenting). I dissent from the opinion and judgment of the court in this case. I notice, as a preliminary matter, a practice which I think is not to be commended, and ought not to be pursued. The application to punish the three appellees was denied by the Circuit Court. The reason given for the decision was the unconstitutionality of that portion of the Interstate Commerce Act which requires a court to treat and punish as a contempt of its authority the refusal of a witness before the commission to answer questions. In the opinion this court considers that reason, holds it unsound, and remands the case for further

proceedings. On such further proceedings the Circuit Court may, without disobedience of the mandate, again deny the application, for the further reason that the questions propounded by the commission to the witnesses are deemed irrelevant or incompetent, and on a second appeal it may be that this court will also be of the same opinion, and then this curious result will appear: Of two successive judgments in the same case, each denying the same application, this court sustains one and reverses the other. I had supposed the rule was settled that the inquiry in this court was simply whether that which was adjudged by the trial court was erroneous, and not whether the reasons given therefor were good or bad, and that a correct judgment was always sustained, even if the reasons given therefor were erroneous. But this is a minor matter, and I only notice it to express my dissent from the practice.

I pass, therefore, to the important question considered by the court in its opinion. With the bulk of that opinion I have no disposition to quarrel. I agree as to the power of the United States over interstate commerce, but that throws no more light on the real question involved herein than an inquiry into the power of congress to enact laws would upon the question determined in *Kilbourn v. Thompson*, 103 U. S. 168, of the right of the house of representatives to punish as for contempt one who refused to disclose the business of a real estate partnership of which he was a member. The power of congress to use all reasonable and proper means for exercising its control over interstate commerce carries with it no right to break down the barriers between judicial and administrative duties, or to make courts the mere agents to assist an administrative body in the prosecution of its inquiries; for, if the power exists, as is affirmed by this decision, it carries with it the power to make courts the mere assistants of every administrative board or executive officer in the pursuit of any information desired, or in the execution of any duties imposed. It informs congress that the only mistake it made in the *Kilbourn* case was in itself attempting to punish for contempt, and that hereafter the same result can be accomplished by an act requiring the courts to punish for contempt those who refuse to answer questions put by either house or any committee thereof.

It must be borne in mind that this is purely and solely a pro-

ceeding for contempt. No action is pending in the court to enforce a right to redress a wrong, public or private. No inquiry is being carried on in it with a view to the punishment of crime; nothing sought to be done for the perpetuation of testimony or in aid of any judicial proceeding. The delinquent is punished for a contempt of court in refusing to testify before a commission in aid of an investigation carried on by such commission. What is this power vested in courts of punishment for contempt, and for what purpose is it vested? It is a power of summary punishment, and existing to enable the courts to discharge their judicial duties. "Contempt of court is a specific criminal offense." *New Orleans v. New York Mail S. S. Co.*, 20 Wall. 392. In *Anderson v. Dunn*, 6 Wheat. 204, 227, it was said that "courts of justice are universally acknowledged to be vested by their very creation with power to impose silence, respect and decorum in their presence and submission to their lawful mandates." So in *Ex parte Robinson*, 19 Wall. 505, 510: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." And in *Cooper's case*, 32 Vt. 253, 257: "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers."

A contempt presupposes some act derogatory to the power and authority of the court. But before this proceeding was initiated the only authority disregarded was that of the commission. The court treats such act derogatory to the powers of the commission as derogatory to its own, and punishes, as for a contempt of its own authority, one who disobeys the order of the commission. It is no sound answer to say that the court orders the witness to testify, and punishes for disobedience of that order. The real wrong is in not testifying before the commission, and that is the ground of the punishment, otherwise, any disregard of any duty can be treated as a contempt of court and punished as such. It

will be sufficient to cite the delinquent and order his punishment as for a contempt of court unless he discharges that duty. His failure to obey the order of the court is only the nominal, while the failure to discharge the prior duty is the real, ground of punishment. No forms of statement can charge the substantial fact that the inherent power of courts to punish for contempt is exercised, not to preserve the authority of the court, not in aid of proceedings carried on in them, but to aid a merely administrative body, and to compel obedience to its requirements. It makes the courts the mere assistants of a commission.

It is said that this proceeding is substantially, if not precisely, similar to that which would arise if congress had passed an act imposing penalties on parties refusing to testify before a commission, and a proceeding was commenced to recover such penalties. But surely the differences are vital. If such proceeding was a criminal prosecution, defendants would have the constitutional guaranty of a trial by jury; and this, too, in an action at law, if the amount of the penalty exceeded twenty dollars. By making it a proceeding for contempt, these constitutional protections are evaded. Further, there is no penalty prescribed. Refusal to answer is not made an offense, misdemeanor or felony.

Suppose a law was enacted making criminal the refusal to answer questions put by a commission (and a statute would be necessary before such refusal could be adjudged criminal, for there are no common-law offenses against the United States). *U. S. v. Eaton*, 144 U. S. 677; 12 Sup. Ct. Rep. 764. Would it not be necessary that the statute define the questions, or at least the scope of the questions, to be asked? Would not an act be void for indefiniteness and lack of certainty which simply made criminal the refusal to answer relevant questions in any proper investigation carried on before a commission? Would it not be like the famous Chinese statute:

“Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.”

Could it be left to the commission to select the matter of investigation, determine the scope of the inquiry, and thus, as it were, create the crime?

Can all these difficulties be avoided by bringing the refusal to testify before a commission within the reach of the comprehensive inherent power of the courts to preserve their authority by proceedings for contempt?

But again it is said that the act of congress imposes upon all persons and corporations engaged in interstate commerce a duty to answer every proper question which the commission may see fit to ask, and that a refusal to answer constitutes a refusal to discharge a duty upon rightful demand. It is true that authority is conferred upon the commission to obtain information, but the act does not impose the duty to furnish it upon all persons interested in interstate commerce, and congress cannot invest the commission with discretionary power to create or not create a duty. If, when a question is asked, a duty is established, then the court would have no power to do anything, except to enforce the act of the commission, if valid, or punish its violation without inquiry, which, as has been stated, would make the court the mere ministerial agent of the commission. If the duty is not established, then the court is called upon to take part in a mere inquiry as to whether it would be lawful or expedient that the duty be established. It is not pretended that the court can take cognizance of the whole investigation on petition, and this application is not a part of any judicial proceeding, nor could the order adjudicate anything. It is clear that the duty, if it exists at all, is a political, and not a judicial, duty. Would mandamus lie to compel the discharge of this duty? Yet mandamus is the recognized proceeding for the enforcement of a duty.

It may be that it is the duty of every citizen to give information to the commission when demanded, but it is no more a duty than it is to avoid murder or other crimes, to lead a life of social purity, to avoid fraud in business transactions or neglect of other duties of good citizenship. Will it be pretended that these obligations can be enforced by the courts through proceedings as for contempt?

To say that there is a case, something that calls for judicial action, because there are parties on the one side or on the other, is a breadth of definition hitherto unrecognized. Every effort at administrative or executive action, which is not voluntarily

assented to by those whom it affects, creates a dispute between parties. Can it be that every such dispute justifies an appeal to the courts, and presents a case for judicial action? If so, there is nothing which any administrative body or executive officer shall attempt to do, which cannot be carried into the courts, and every failure to comply with the orders of such body or officer made to subject the delinquent to punishment by the process of contempt. Hitherto the power to punish for contempt has been regarded as a power lodged in judges and courts to compel obedience to their orders, decrees and judgments, and to support their authority.

This is something more important than a mere question of the form of procedure. It goes to the essential differences between judicial and legislative action. If this power of the courts can be invoked to aid the inquiries of any administrative body, or enforce the orders of any executive officer, why may not the power to punish for contempt be vested directly in the administrative board or in the executive officer? Why call in the court to act as a mere tool? If the interstate commerce commission can rightfully invoke the power of the courts to punish as for contempt those who refuse to answer their questions, why may not like power be given to any prosecuting attorney, and he be authorized to summon witnesses — those for as well as well as those against the government — and in advance compel them, through the agency of the courts, to disclose all the evidence they can give on any expected trial? If these appellees have committed crime, punishment therefor comes only through the courts, and by the recognized procedure of information or indictment. They cannot be tried by the commission for any act done.

One often-declared difference between judicial and legislative power is that the former determines the rightfulness of acts done; the latter prescribes the rule for acts to be done. The one construes what has been; the other determines what shall be. As said in *Cooley Const. Lim.* side p. 92:

“In fine, the law is applied by the one and made by the other. To do the first, therefore — to compare the claims of parties with the law of the land before established — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past or the present, and do not look

wholly to the future, they violate the definition of a law as 'a rule of civil conduct,' because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

So, for whatever the appellees have done in the past, whether they have violated any law of the land or not, an inquiry is to be made in and by the courts. The judicial power cannot be invoked to sustain an investigation into past conduct, which, when disclosed, may or may not be, at the will of an administrative board or executive officer, presented for judicial consideration or action. It is not meant to be affirmed that no inquiry can be made into past conduct or actions except through the power and processes of the courts. On the contrary, the full power of legislative or executive departments to inquire into what has been is conceded. But, if designed to aid legislative or executive action, it must be by legislative or executive proceedings. Can the courts be turned into commissions of inquiry in aid of legislative action.

In short, and to sum it up in a word: If these appellees have violated any law, their punishment should be sought in the ordinary way, by prosecution therefor in the courts. If they have violated no law, and the simple purpose is to elicit information for the guidance of the commission or the legislature, let that information be sought by the ordinary processes of legislative or administrative bodies.

Take a familiar illustration: Once in ten years a census is ordered by authority of congress, and the scope of that census, constantly enlarged, is to elicit from the citizens of the United States information as to a variety of topics. No thought of punishment for past misdeeds enters into such an inquiry. Information, and that only, is sought. It is unquestionably the duty of every citizen to respond to the inquiries made by the census officers, and furnish the information desired. Can it be that courts can be authorized to make the refusal of a citizen to furnish any such desired information a contempt of their authority, and to be punished as such? There is no question of the lawful power of congress to elicit this information; possibly, none as to its power to provide that a refusal to give the information shall be deemed a misdemeanor, and prosecuted and punished

as such. But it seems to me to obliterate all the historic distinction between judicial and legislative or administrative proceedings to say that the courts can be called upon to punish as for a contempt of their authority a mere refusal to respond to this administrative inquiry as to facts.

This question was fully considered by Mr. Justice FIELD, while holding the Circuit Court, *In re Pacific Railway Commission*, 32 Fed. Rep. 251, and the power of congress to make the courts the mere assistants of an investigating committee was most emphatically denied.

I am authorized to say that Mr. Chief Justice FULLER and Mr. Justice JACKSON concur in the views herein expressed.*

CONSTITUTIONAL PRIVILEGE OF WITNESS AGAINST SELF-CRIMINATION.

1. The various constitutional provisions on the subject are made for the same purpose and should receive the same construction.— This is the view taken by the Supreme Court of the United States in *Counselman v. Hitchcock*, 142 U. S. 547, 548. After referring to the different wording of various Constitutions, the court, by BLATCHFORD, J., says: “But, as the manifest purpose of the various constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the Constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be ‘compelled to accuse or furnish evidence against himself,’ such a provision should not have a different interpretation from that which belongs to Constitutions like those of the United States and New York, which declare that no person shall be compelled in any criminal case to be a witness against himself.” Approved in *State v. Simmons Hardware Co.*, 109 Mo. 118; 18 S. W. Rep. 1125.

2. The constitutional provision protects the witness against making any disclosure that will tend to show his connection with a criminal offense.— Says the court in *Counselman’s* case: “It is a reasonable construction, we think, of the constitutional provision, that the witness is protected from being compelled to disclose the circumstances of his offense, the sources from which or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.” *Counselman v. Hitchcock*, 142 U. S. 547, 585. The following are leading cases of the same purport: *Emery’s case*, 107 Mass. 172; *Cullen v. Commonwealth*, 24 Gratt. 624; *Temple v. Commonwealth*, 75 Va. 892; *Boyd v. United States*,

* Reported in 154 U. S. 447; 14 Sup. Ct. Rep. 1125.

116 U. S. 616; *State v. Simmons Hardware Co.*, 109 Mo. 118; 18 S. W. Rep. 1125; *Ex parte Boscowitz*, 84 Ala. 463; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219; 38 N. E. Rep. 303.

3. **If the offense is barred by the Statute of Limitations the witness may be compelled to testify.**—The authorities are almost uniform to this effect. *Calhoun v. Thompson*, 56 Ala. 166; *Ex parte Boscowitz*, 84 Ala. 463; *United States v. Smith*, 4 Day, 121; *Weldon v. Burch*, 12 Ill. 374; *Mahauke v. Cleland*, 76 Iowa, 401; 41 N. W. Rep. 53; *Currier v. Concord R. Co.*, 48 N. H. 321, 332; *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 3 Am. R. R. & Corp. Rep. 22, 32; *Close v. Olney*, 1 Denio, 319; *La Fontaine v. Southern Underwriters*, 83 N. C. 132; *State v. Wharton*, (Tenn.) 3 S. W. Rep. 490; 1 Greenl. Ev. § 451; 1 Whart. Ev. § 540. *Contra*, *McFadden v. Reynolds*, (Penn.) 11 Atl. Rep. 638.

4. **So, if the witness has already been convicted or acquitted of the offense, or has been pardoned.**—*Lothrop v. Roberts*, 16 Col. 250; 27 Pac. Rep. 698; *Queen v. Boyer*, 1 B. & S. 311; 101 E. C. L. R. 309; *Currier v. Concord R. Co.*, 48 N. H. 321, 332; *La Fontaine v. Southern Underwriters*, 83 N. C. 132.

5. **But a witness cannot be compelled to testify because of a statutory provision that his testimony shall not be used against him.**—This proposition is supported by very convincing reasons in the following cases: *Counselman v. Hitchcock*, 142 U. S. 547; *Emery's case*, 107 Mass. 172; *Cullen v. Commonwealth*, 24 Gratt. 624; *Temple v. Commonwealth*, 75 Va. 892. On the other hand a number of cases hold the contrary, among which are: *State v. Quarles*, 13 Ark. 307; *Higdon v. Heard*, 14 Ga. 255; *Ex parte Rowe*, 7 Cal. 184; *Wilkins v. Malone*, 14 Ind. 153; *Bedgord v. State*, 115 Ind. 275; *People v. Kelly*, 24 N. Y. 74.

6. **A witness may be compelled to testify where he is afforded by statute complete immunity as to any offense disclosed by his evidence.**—This proposition has been held in a number of cases, and in all the cases, so far as we are aware, in which the question has arisen. It has been directly held in the following cases: *State v. Howell*, 58 N. H. 314; *People v. Sharp*, 107 N. Y. 427; *Hirsch v. State*, 8 Baxt. 89; *Floyd v. State*, 7 Tex. 215; *Kendrick v. Commonwealth*, 78 Va. 490. In the New Hampshire case, referring to *Emery's case*, 107 Mass. 172, the court says: "If our statute went no further in this respect that case would be directly in point. But it provides not only that the testimony of the clerk, servant or agent shall not be used as evidence against the witness, but also that he shall not be thereafter prosecuted for any offense so disclosed by him. This provision has the effect to except from the operation of the statute all clerks, servants and agents upon their testifying against their principals. The conditional exemption becomes absolute when the witness testifies; and, being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself." P. 315.

And in *Hirsch v. State*, 8 Baxt. 89, it is said: "Now, the statute in question cannot properly be denominated a statutory pardon, because the legislature has not the power to pardon public officers. But they have complete power as to the creation and punishment of public offenses, and may create

new ones or abrogate old ones at pleasure, if there be no constitutional inhibition to the contrary. Having thus the supreme control of the police power of the state, it was certainly competent for the legislature to pass such laws as might be necessary to enforce them with energy and vigor. The exemption of the witness from prosecution for any offense whereof he gives evidence before the grand jury was, as to him, an abrogation of the offense. He could neither be accused by another, nor could he accuse himself, and, therefore, he could not criminate himself by such testimony." See, also, *State v. Warner*, 13 La. 52, 60, 84.

The same conclusion is implied by the opinion in *Counselman's case*, 142 U. S. 547, wherein it is said: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least, unless it is so broad as to have the same extent in scope and effect." P. 585. And, again, "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." P. 586. There is a similar implication in *Emery's case*, 107 Mass. 172, 185.

The only decision to the contrary is that of *United States v. James*, 60 Fed. Rep. 257, which is noticed at length in the next section.

7. Application of these principles to investigations and proceedings touching violations of the Interstate Commerce Act.—Following the decision in *Counselman's case*, congress passed an act, approved February 11, 1893, which provided that no person should be excused from testifying or producing evidence before the commission, or in obedience to its subpoena, or in any proceeding touching violations of the act, on the ground that the evidence required would tend to criminate him, or subject him to a penalty or forfeiture. It then provided as follows: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to the subpoena or the subpoena of either of them, or in any such case or proceeding." 27 U. S. Stat. 443.

This statute does not appear to have been before the courts, except in *United States v. James*, 60 Fed. Rep. 257. In that case it appeared that an investigation was in progress before the grand jury as to violations of the Interstate Commerce Act. The defendants were called as witnesses and refused to answer certain questions, on the ground that their answers might tend to criminate them, or lead to disclosures that would criminate them. The facts were reported to the court and the defendants were ruled to show cause why they should not be punished for contempt. It was conceded that the act of February 11, 1893, afforded the defendants complete immunity from punishment, but the court held that the purpose of the fifth amendment, "that no person shall be compelled in any criminal case to be a witness against himself," was not only to guarantee the witness immunity against compulsory self-accusation of crime, so far as it might bring to him law-inflicted pains and penalties, but also "to make the secrets of memory, so far as they brought one's former acts within the *definition of crime*, inviolate as against judicial probe or disclosure." The rule was accordingly discharged.

The court (GROSSCUP, J.) says: "The privilege which the framers of the amendment secured was silence against the accusation of the federal government — silence against the right of the federal government to seek out data for an accusation. This privilege of silence was, as they believed, and as events then looked, in the interest of progress and personal happiness, as against the narrow views of adventitious power. Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? Then, too, if the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecutor? I cannot think so. * * *

The effectiveness of the statute of February 11, 1893, might well be questioned on another ground. It is a statute of pardon. Until the witness makes his disclosure he is chargeable with the offense within his personal knowledge. The pardon becomes effective only at the moment and upon condition of disclosure. But pardon is not necessarily unilateral. No person is compelled to accept the legislative or executive grace. Chief Justice MARSHALL, speaking for the Supreme Court, so held in Wilson's case, 7 Pet. 150, where a pardon was granted by the president for a capital offense. In the case at bar it must be assumed that the witness is guilty of some offense. In the absence of the statute of February 11, 1893, he has the undoubted constitutional right of silence. It is said that that right is taken away by the immunity or pardon extended by the statute. But he chooses not to accept such immunity or pardon. His refusal to answer the question is such refusal of acceptance. He prefers to stand upon his constitutional right and take his chances of conviction, rather than expose himself to the civil liabilities and the odium of self-confessed crime. It may be that the offense is of an ancient date, and has been succeeded by years of immaculate conduct and citizenship. Exposure, self-confessed exposure, would lose him his place in society, his good name in the world, and, like a bill of attainder, taint his blood and that of all who inherit it. It might well be that he would refuse to give up the sacred privilege of silence for a pardon. It is not difficult to suppose a case where the inquiry of the government was not directed to his crime, but to something immeasurably less important and inconsequential. The benefit to society might be a trifle, compared with the catastrophe to him and his descendants. I am not impressed with the belief that he has no right to stand upon the constitutional privilege of silence, and thus refuse the grace of the legislative or executive power."

It is manifest that this decision is directly opposed to those cited in the last section, as well as opposed to the principle of those cases which hold that the witness is not excused from testifying when a prosecution is barred, or when the witness has already been tried for the offense in question, or has been pardoned. These authorities do not appear to have been called to the attention of the court, for the judge says, in his opinion: "No decision of any state has been called to my attention in which the constitutional provision was construed in the light of a statute granting complete immunity against prosecution." P. 261.

8. The constitutional provision does not protect the witness from making disclosures that merely tend to involve him in disgrace and ignominy.— This proposition is necessarily implied in all the cases which hold that the witness must testify if he is afforded immunity by statute, or if a prosecution is barred or otherwise made impossible. But the claim was specifically urged in some of the cases, that the witness was protected from giving evidence that would tend to disgrace him, and the claim was expressly overruled. *State v. Newell*, 58 N. H. 314; *Kendrick v. Commonwealth*, 78 Va. 490; *Ex parte Boscowitz*, 84 Ala. 463; *Weldon v. Burch*, 12 Ill. 374; *People v. Kelly*, 24 N. Y. 74. The more approved common-law doctrine is that a witness is not excused from giving evidence which may tend to disgrace him, when the evidence sought is material to the issue, but if it merely pertains to collateral matters, he is excused. 1 Greenl. Ev. § 454, and cases cited; 1 Whart. Ev. 542, and cases cited.

But, of course, any common-law doctrine on the subject may be modified or abrogated, at the pleasure of the legislature. "It is also objected," says the court in *State v. Newell*, 58 N. H. 314, 316, "that the witness is not bound to answer because his evidence may tend to disgrace him, but this doctrine of the common law it must be competent for the legislature to change, which it has done."

CHARLES TYRELL LOAN & BLDG. ASSN. v. HALEY.

(Supreme Court of Pennsylvania, October 1, 1894.)

1. BUILDING AND LOAN ASSOCIATIONS. MODE OF COMPUTING VALUE OF SHARES. BY-LAWS. ESTOPPEL TO DISPUTE MODE OF COMPUTATION ADOPTED BY ASSOCIATION. A member of a building and loan association, whose shares have not matured according to the mode of computation originally adopted by the association, and used by it for nearly thirty years, is not estopped from claiming that by another and juster method of computation his shares are matured.

2. A provision in the constitution of a building and loan association that "where it shall be ascertained" that the value of each share of stock amounts to \$200, a meeting of the shareholders shall be convened, at which time a division shall take place, etc., does not obligate a shareholder to abide by any particular mode of computation, or the mode adopted and used by the association in determining the value of his shares.

ACTION by the Charles Tyrell Loan and Building Association against Jeremiah Haley to foreclose a mortgage. From a judgment entered on the report of a referee in favor of defendant, plaintiff appeals.

John H. Sloan and Wm. Henry Lex, for appellant. William Gorman, for appellee.

GREEN, J. When this case was here before (139 Penn. St. 476; 20 Atl. Rep. 1063) the judgment was reversed because of the rejection of the defendant's offer to prove that the stock of the eighth series, in which he was a stockholder, had reached a value of \$200, and was really worth \$218.24 in November, 1887. We said (PAXSON, Ch. J.): "But when the stock has fully matured I am unable to see what right the association has to recover a judgment against one of its stockholders for the amount of his loan." And again: "If his series has matured he was entitled to stop paying and to rely upon the association surrendering his securities when the proper time arrived. If, instead of doing this, the association brings suit upon his mortgage, he can surely set up an equitable defense and show that his stock has matured. * * * If the defendant can sustain his offer he has a full defense to the mortgage, and we are of opinion the evidence should have been admitted." Acting upon this ruling the referee in the present case admitted the evidence offered, and upon a consideration of the whole evidence upon this subject he decided that the testimony sustained the offer, and that in point of fact the stock of the eighth series fully matured in November, 1887, and was at that time worth \$215.66. The referee also found that because of this value of the defendant's stock the debt in suit was fully paid in November, 1887, under and in accordance with the constitution and by-laws of the association, and that, therefore, the defendant was entitled to have his bond and mortgage satisfied of record and returned to him. If this finding was correct the judgment must be affirmed. Now, the correctness of the finding is not really attacked or impeached, but it is contended that the association pursued another mode of determining when its stock was matured, and according to that mode this stock had not quite matured by

becoming of the value of \$200 in November, 1887, and that the defendant is bound by the method of computation adopted by the association, and is estopped from alleging or setting up any other mode. As to the application of the doctrine of estoppel in such a case, and upon such facts, it is quite out of the question. Practically there is no element which is essential to estoppel that is present in this case. It is most certain that no action or omission to act on the part of the defendant ever induced the plaintiff to adopt or follow the method of computation upon which the plaintiff insists. The association never parted with any money in consequence of being misled by the defendant. The fact that the defendant did not object to the method pursued at previous times proves nothing. He was not called upon to object; he was not obliged to take any action at those times. His interests were not then affected, and he was not obliged to speak. He may not have known anything about this somewhat mysterious subject which has puzzled the brains of so many intelligent men, lawyers and laymen alike, and about which so many experts differ. We are not referred to any evidence which proves or tends to prove that he had any knowledge of it whatever. Further, the language of the 12th article of the constitution, which is invoked as obligating the defendant to a particular mode of computation, says nothing about any mode. It simply says: "When it shall be ascertained that the value of each share of stock amounts to \$200, a meeting of the shareholders shall be convened, at which time a division shall take place, and the holder of each share of stock shall receive the sum of \$200, or his or her own securities to that amount, with the same fully satisfied and discharged of record." Ascertained how? The article does not say. Then it must be ascertained according to right and justice, and that is law. If any particular mode is unjust, it is wrong, and ought not to be adopted, and, if adopted, ought not to be followed. But substantially we decided this question in the former hearing in this court, because, notwithstanding the very same objection made then as now, we decided that the defendant was at liberty to show what the real value of the stock was in November, 1887.

It seems to us the contention is narrowed to the inquiry, which is the just and proper method of ascertaining the value of the stock of the particular stockholder who is one of a particular

series? Is it the method pursued by the plaintiff, or the method found and adopted by the referee? The referee states his method quite clearly and at length, after first stating his objections to the method pursued by the plaintiff. He thus speaks of the latter method: "An examination of the mode demonstrates beyond question its injustice and inequality. The 'division of profits for the year,' as it is called, is to every share in every series alike. This is only superficially fair, because it ignores the amount of money accumulated as capital in the various series. At the beginning of the year, in November, 1886, each share of the sixth series had an accumulated capital of \$132; each share in the seventh series, \$120; each share in the eighth series, \$114; while each share in the nineteenth series had only \$12, and each share in the twentieth series had none. It is true that each share during the year paid in alike \$12, but can it be that the share having no capital should receive equal profits for the year with the share having a capital of \$132? Surely not; in addition to which this mode makes no allowance for a great loss or unusual profit. It is not in the least elastic, and under it no provision whatever is made for profit and loss. It might possibly do for a single series, but should never be used where there are a number of series." This is the method adopted by the referee: "The annual report of the association plaintiff made in November, 1887, shows assets \$44,678.96, of which amount \$30,891 were stock payments, and the balance, \$13,787.96, were profits. These profits evidently belonged in a fair proportion to the stockholders of the various series. It is obvious that the stockholders in the oldest series should be entitled not only to a share of the profits pro rata, but that the time during which the payments had been made should be also considered in reaching a fair and equitable division. If this be conceded, then the number of shares of each series should be multiplied by the number of months during which payments were made upon them, to find the amount paid in each series. Then multiply the result by one-half the number of months the particular series had run (that is, averaging the time) would produce for the purpose a just distribution of the capital invested for one year by that series. Doing the same with each series, and adding together the various amounts of capital thus found, gives the whole capital of the association for the year. Dividing the

profits by this aggregated capital gives the per cent of the profits for each share for the year. The multiplying the amount actually paid on each share by the percentage gives the exact profit of each share in each series, and then adding the profit to the actual payment gives the exact value of each share." The referee then annexes a table showing the number of each series, the number of shares of each series, the months paid by each, the average time of each, the amount paid in by each, and the amount invested for one year by each. He states the result as follows:

"Assets, \$44,678.96, \$30,891. \$13,787.96 profits.

"\$13,787.96, \$98,873, 13.9 percentage.

"Therefore, taking one share of stock in the eighth series, the one in question, which in November, 1887, had run $10\frac{1}{2}$ years, and averaging its time at $5\frac{1}{2}$ years, at 13.9 per annum, makes $72\frac{1}{2}$ per cent, which, on \$126 paid on stock, produces a profit of \$89.66, and, adding to it the amount paid on stock, \$126, makes each share worth \$215.66."

We are obliged to say that, after a careful examination of the testimony on this subject, we regard this as a fair, just and equitable method of computing the value of the stock where it is issued in several series, and that in these respects it is altogether superior to the mode pursued by the plaintiff. The referee was sustained in his conclusion not only by his own reasoning upon the subject, but by a large preponderance of the expert testimony taken before him. One of the witnesses — Joseph Shehan — who had had many years' experience in building association matters, and was treasurer of one for eight years, testified that the just and equitable mode of computing the value of the stock, when issued in several series, was the mode adopted by the referee, and stated his reasons more fully, and he explained also the injustice of the plaintiff's method. Another witness — Michael J. Brown — who had an experience of twenty-five years in building association matters, testified to the same effect, and gave the most ample and satisfactory reasons for his conclusions. He was asked: "Q. You have heard Mr. Shehan's explanation of dividing profit according to capital paid in. Should it be done in that way, or how would you do it? A. That is the way I do it, and that is the way, probably, that seventy-five per cent of the societies in the United States divide their profits now. There was a time when

they did not do it, but this is of course absolutely ridiculous. There is no doubt about that." Much more testimony of the same character was given, and we are clearly of opinion that the conclusion of the referee as to the method of computing the profits was entirely justified by the evidence.

A question is suggested whether there should not be a valuation of all the shares of all the series at any time when a question arises as to the valuation of the shares of a particular member, and whether, therefore, a bill in equity ought not to be filed in order to bring in all the parties in interest. We held in this case when it was before us last that the defendant could make his defense in the action on the bond without being obliged to resort to such a proceeding. But it would be an appropriate course to pursue, and one with which it would not be possible for any member to find fault, as the absolute value of every share would or might by that means be determined with accuracy. As at present advised, we are not disposed to turn the defendant out of court for not pursuing his remedy in that way, in view of the testimony and findings in the court below. The assignments of error are all dismissed. Decree affirmed, and appeal dismissed, at the cost of appellant.

FELL, J. (dissenting). There are two methods of dividing profits in use by building associations having more than one series of stock. By one method the total annual profits are divided equally among all the shares, by the other the annual profits are divided among the shares in proportion to the amount paid on each. The first method is open to the objection that it gives to a share on which one year's dues have been paid the same profit that is given to a share on which a much larger amount has been paid. The second method is better, as by it each share is given each year the exact portion of the profits it is entitled to on the basis of the amount paid; and it is the money paid on the stock that earns the profits. To this point I agree fully with the learned referee, but I cannot accept the conclusion which he reached. It was competent for the association to adopt the first plan, or any plan which did equal justice to all of its members. It adopted the first, and has worked under it since its organization, in 1859. If, as a matter of business, this plan was not the wisest, still it was a

just plan. It operated equally on every share of stock. A share was given too much the first years and too little the last. It received its exact proportion only at the middle of the life of the series, but it received in the end the full amount to which it was entitled. The plan worked equally as to all the shares, and exact justice was done to each stockholder. This plan was deliberately adopted by the stockholders at the beginning in 1859, and each year since it has been submitted to and approved by them at their annal meeting. It has been the basis upon which all the business of the association has been conducted, its stock matured, its loans settled, the withdrawal value of shares fixed. Under this plan the defendant's stock was during the earlier years credited with an undue portion of the profits. Now that the time has come when he will receive less, and by the process of adjustment get only his exact portion, he for the first time objects, and seeks to have applied to him a new plan, which will mature his stock eighteen months earlier. This is not equitable ; it is not honest ; it is unfair to every other stockholder. The legal aspect of the defendant's contention is no better than its moral aspect. If the plan was just, it was binding, and that is the end of it. A court may well say that the plan adopted must be a just one, and, having done that, it has reached the limit of the proper exercise of its power. It should not, and I submit that with propriety it cannot, say that one plan for the management of corporate business is better than all others, and that one shall be adopted. The division of profits and the maturing of the stock of a building association are subjects for corporate action. If the plan adopted is not unjust, with its wisdom a court has nothing to do. If it is unjust, the remedy is by bill under which the rights of all the stockholders may be considered and adjusted on a plan equitable to all. If the plaintiff, without proof of fraud or unfair dealing, is permitted to take the management of the affairs of the association out of the hands of its stockholders, and have them submitted to a jury for supervision and change, any other borrower may do the same, and, instead of one uniform plan, selected by those who are to be affected by it, there may be as many as the wisdom or whim of a jury may devise. There is no conflict between these views and the opinion of this court when this case was before it in 1891. The decision reported in 139 Penn. St.

480 ; 20 Atl. Rep. 1063, goes no further than to say that it was competent for the defendant to prove that his stock had matured. He may certainly do that, but the rule by which it is to be determined is the rule of the association, not a new rule. For the reasons stated, I do not concur in the judgment rendered in this case.

MITCHELL, J., concurs in this dissent.*

Building and loan associations—effect of giving notice of withdrawal to terminate relation of stockholder—waiver of such notice.—The by-laws of a building association allowed stockholders to withdraw their stock on giving the corporation sixty days' notice of their intention to do so. Held, that the mere giving notice of an intention to withdraw did not make the person giving it cease to be a stockholder. *Decatur Building & Investment Co. v. Neal*, 97 Ala. 717; 12 South. Rep. 780. Knowingly and intentionally participating as a stockholder in stockholders' meetings held six and ten months after giving such notice constitutes a waiver of the right to withdraw under such notice. *Ibid.*

COMMONWEALTH v. VROOMAN.

(Supreme Court of Pennsylvania, October 1, 1894.)

1. **CONSTITUTIONAL LAW. PROHIBITING THE DOING OF AN INSURANCE BUSINESS EXCEPT BY CORPORATIONS NOT IN VIOLATION OF THE FEDERAL CONSTITUTION.** The act of Pennsylvania of 1870, "to prevent the issue of unauthorized policies of insurance," which makes it unlawful for any person, partnership or association to issue any policy of insurance against fire without authority to do so, expressly conferred by a charter of incorporation given according to law, and declares policies issued without such authority void, and the issuance thereof a misdemeanor, is not in conflict with the fourteenth amendment of the Federal Constitution, prohibiting states from making any law which abridges the privileges or immunities of citizens of the United States, and from denying to any person the equal protection of the laws.

2. **NOR IN VIOLATION OF THE RIGHTS OF LIBERTY AND PROPERTY GUARANTEED BY THE STATE CONSTITUTION.** Such statute does not conflict with the bill of rights of Pennsylvania, which declares that all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of acquiring, possessing and protecting property and reputation.

3. **THE INSURANCE BUSINESS IS SUBJECT TO POLICE REGULATION.** The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners and the nature of the business, a proper subject for the exercise of the police power of the state.

* Reported in 30 Atl. Rep. 154.

4. THE ACT IN QUESTION IS A REASONABLE REGULATION, AND IS VALID, The act of 1870 is a valid exercise of the police power. It does not prohibit but regulates the business, excluding no one from engaging in it, but prescribing a preliminary qualification for all alike. This qualification is reasonable, is open to all under general laws and not burdensome. Its only effect is to secure adequate capital at the beginning, and state supervision during the continuance of the business.

SAMUEL V. VROOMAN was acquitted of the charge of issuing for himself and others a policy of insurance against loss by fire without having obtained a charter of incorporation authorizing the same, and the commonwealth appeals.

George S. Graham, District Attorney, and W. U. Hensel, Attorney-General, for the commonwealth. John G. Johnson, for appellee.

WILLIAMS, J. This case raises a question of constitutional law that does not seem to have been decided by the courts of this state. The facts are that in 1870 the legislature passed and the governor approved an act entitled "An act to prevent the issue of unauthorized policies of insurance." Section 1 made it unlawful for any person, partnership or association to issue any policy of insurance against fire without authority to do so expressly conferred by a charter of incorporation given according to law, and declared all policies issued without such authority to be void. The 2d section made it a misdemeanor to issue a policy of insurance against loss by fire without the authority required by the 1st section. The special verdict rendered in this case finds that the defendant did violate the act of 1870 by making and issuing for himself and others a policy against loss by fire, in the year 1894, without having obtained a charter of incorporation authorizing the making of such insurance. Upon this verdict the learned judge of the court below entered a judgment in favor of the defendant, holding that the act of 1870 was void, because in violation of the Constitution of the United States and of this state. The commonwealth appeals.

A single question is thus presented, viz., does the act of 1870 violate the Constitution of either the United States or this state? The learned judge held that the fourteenth amendment to the Constitution of the United States was infringed by the act of

1870. This amendment declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any within its jurisdiction the equal protection of the laws." The purpose and effect of this amendment have been discussed and declared by the United States courts in many cases, and there ought to be no doubt upon the subject at this time. It was aimed at discriminations made or attempted by the laws of any of the states against persons upon whom the laws of the United States conferred the rights and privileges of citizenship. Such discriminations, whether directed against persons of a particular race or color, resident within the state, or against persons resident in other states, are forbidden by the fourteenth amendment. But the proper exercise of the police power by the several states is not within the intent of the letter of the amendment. *Powell v. Pennsylvania*, 127 U. S. 678; 8 Sup. Ct. Rep. 992, 1257. On the other hand, its purpose was declared in the *Slaughterhouse cases*, 16 Wall, 36, to be to protect "against the hostile legislation of the states, the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states."

The act of 1870 strikes at no privilege of citizenship of the United States, as distinguished from the privileges of citizenship of Pennsylvania. It does not attempt to draw a line between citizens of this state and citizens of other states. It is, therefore, in no sense a violation of the fourteenth amendment of the Constitution of the United States, and this branch of the discussion may be properly dropped at this point, and our attention confined to the other, viz., is the act of 1870 a violation of the 1st section of the bill of rights in the Constitution of this State? That section affirms that "all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of * * * acquiring, possessing and protecting property and reputation." The methods by which this right to acquire property is asserted and exercised are, however, and have been since organized government began among men, subject to regulation by law. The power of government thus brought into service is known as the "police power." If the act of 1870 is a valid

exercise of the police power, then no constitutional right is invaded, but the mode in which the right guaranteed by the 1st section of the bill of rights may be exercised consistently with the best good of the greatest number is regulated and prescribed. The general character of the police power is well understood, although neither the text books nor decided cases have yet given us an adequate definition of it. Little more has been attempted by the courts of this country than to determine that a particular subject does or does not fall within the range of this power. An illustration is afforded by the *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, in which this language was used: "However difficult it may be to render a satisfactory definition of it [the police power], there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals." Blackstone, in his *Commentaries* (Vol. 4, p. 162), describes this power as the power of "public police and economy," by which the internal regulation and good order of the state is secured, and individual citizens, like the members of a well-ordered family, are made to conform their conduct to the rules of propriety, good neighborhood and good manners. It is, therefore, a power inherent in all forms of government. Its exercise may be limited by the frame or Constitution of a particular government, but its natural limitations, in the absence of a written Constitution, are found in the situation and necessities of the state; and these must be judged of, in the first instance, by the government itself. It corresponds to the right of self-preservation in the individual. When the dangers that threaten the state come from without, the right of self-preservation is exercised in gathering armies and the means of public defense. When the dangers arise within the state, self-preservation requires their suppression. This is accomplished by the exercise of the police power, which deals with all forms of disorder, and provides for the public welfare and the protection of citizens against the violence and the fraudulent conduct of each other.

Now, the question whether any particular subject is so related to the public good as to justify the exercise of this power in its control is one for the determination, in the first instance, of the law-making branch of the government. In disposing of it, the

legislature is subject to no limitations, except such as the Constitution of the state may impose. Within the lines set by constitutional provisions, the power of the legislature is practically absolute; but, if it is alleged that a given police regulation violates the fundamental law, a question is raised for the determination of the courts, whose duty it is to apply the constitutional tests, and adjudge the law to be void if it is in conflict with them. In this case we are to apply the 1st section of the bill of rights to the act of 1870, in order to determine whether it can be enforced. If the act denies the inherent and inalienable right of the citizen to acquire, possess and protect property, which is asserted by this section of the bill of rights, then the judgment of the court below was right, and this appeal should be dismissed; but if this right is not denied, and the effect of the act of 1870 is merely to regulate its exercise, then the judgment should be reversed, and the defendant should suffer the penalty of the law he has disregarded. Before entering upon this question, three preliminary observations should be made: First, we must remember that the legal presumption is in favor of the constitutionality of the act, because it expresses the judgment of the legislative branch of the government upon that question. The legislature has considered the question, and passed upon it, and this makes a *prima facie* case in favor of the law. We observe, in the next place, that this question is to be considered upon the state of the law as it is when the question is raised. Since 1870 the Constitution of the state has been remodeled, and many of its new provisions have been enforced by suitable legislation. Our question is not, therefore, whether the act of 1870 was valid under the Constitution as it then stood, but whether it was valid when its provisions were invoked against the defendant, in 1894. Our third observation is that the question is not controlled by common-law maxims. The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common-law rules to meet changed conditions in society and increased volume and improved methods in business.

We come now to inquire whether the business of insurance against loss by fire is at the present time a proper subject for the exercise of the police power of the state. In examining this

question, it is important to know something about the magnitude of the business. The report of the insurance commissioner, appointed under the laws of the state, covering the transactions of the year 1892, shows that risks were written in Pennsylvania during that year as follows:

By stock companies of Pennsylvania, amounting to	\$286,584,023
By stock companies of other states.....	412,489,251
By stock companies of United States branches, foreign companies.....	248,407,450
By mutual companies of Pennsylvania.....	137,328,820
	<hr/>
	<u>\$1,084,809,544</u>

—Making the enormous total of one billion and nearly eighty-five millions of dollars. The losses paid in the same year, as shown by the same report, amounted to nearly seven and one-quarter millions of dollars. The total capital employed in the business of fire insurance in this state during the year was nearly two hundred sixteen and one-half millions of dollars. The premiums paid by the insured fell a little short of twelve millions of dollars.

Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions necessary to the business of insurance are (a) the existence of a known danger to which all property owners are exposed, and against which they cannot effectually protect themselves; (b) the strong probability that loss from this danger will fall upon but few of those who are exposed to it; (c) the certainty that, when the loss happens, it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; (d) some knowledge of the relative value of the property annually destroyed by fire, to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses, and secure a fair return for the capital employed. In view of the magnitude and the nature of the insurance business, it is apparent that the public is largely interested in all that relates to it. The security of policyholders requires — First, permanency in the custodian of the funds gathered from them, and on which their indemnity

in case of loss depends ; second, an honest and competent administration of these funds ; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policyholders ? How are these safeguards to be obtained ? There is but one way in which they can be obtained, and that is by means of general laws regulating the insurance business. Corporations derive their existence from the state, and hold their franchises subject to legislative control. They are subject to the visitorial power of the commonwealth, and they may be, and are, in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared and the investments made. The legality and business value of the methods, the economy and financial strength of the management and the value of the security provided for the holders of policies in any given company, are, therefore, subjects upon which the proper state officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitorial power. They cannot ordinarily be compelled to disclose their business methods, their financial condition or the character of their investments. They cannot be restricted in the use of either their capital or their profits, as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The state can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

In the next place, it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized. A general supervision and control of insurance companies have been assumed by the states and exercised through the insurance department. In our state this system of legislation began as early as 1810, and it has grown in bulk and importance with the growth of business and the development of the resources of the state. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against

fire, on the stock plan, at \$100,000. It provides for a reserve fund for the security of policyholders. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy, and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies organized under the laws of other states or countries to make certain deposits in this state to secure those who are insured by them, and to appoint some suitable agent, on whom process may be served in actions brought against them. These regulations have been made from time to time as their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them cannot be enforced against private persons or partnerships. As matter of fact, the business has for many years been left to the corporations, and regulations made to affect corporations have, therefore, met fully the public need. At this time, however, private capital is seeking employment in this field, and it signals its entry upon the field by a denial of the power of the state over it. The question has been raised by the corporations of other states, but I recall no case in which it has been raised by individuals. In *Doyle v. Insurance Co.*, 94 U. S. 535, the Supreme Court of the United States stated the general rule thus: "A state has the right to impose conditions not in conflict with the Constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another state, or to exclude it altogether."

It would seem to follow, logically, that the state might require all persons desiring to enter upon the business to comply with the same condition, and, if necessary, to obtain a charter of incorporation in order to such compliance. An effort is made to distinguish between regulation and prohibition, and to hold that the act of 1870 is a prohibition operating upon all natural persons for the benefit of corporations who are thus given an oppressive monopoly of the business of insurance against fire. But the prohibition is only such as is necessary to give effect to the regulation which the act prescribes. The act implies a declaration by the legislature that the business of insurance against fire affects so

many persons, and involves such large sums of money, as to make it necessary for the public protection that it be subjected to the supervision and control of the government; that the supervision required is such as private persons cannot be compelled to submit their business conduct to; and then expressly declares that all persons desiring to embark in the business must procure a charter of incorporation for that purpose, because corporations are subject to the supervision and control of the state that creates them. This is regulative. It directs the business into the only channel that admits the necessary measure of control, and it necessarily prohibits the business outside that channel. The traffic in intoxicating drinks is regulated by law; but the regulation prohibits absolutely all persons from engaging in it, unless they have first secured the permission of the state, by obtaining a license under the law. Here, as in the act of 1870, we find permission to those who comply with the regulation, and prohibition to those who do not. The practice of medicine, the sale of drugs, and many other sorts of business are regulated by law; but the regulation would be without effect if it did not include a prohibition directed against those not qualified, and enforce it with suitable penalties. The police power of a state may be exerted for the complete or the partial control of a given business. It may prohibit it absolutely to all persons for the purpose of suppression. It may permit it to some persons, and under certain restrictions, in order to secure control over it and hold it within proper bounds. *Stone v. Mississippi*, 101 U. S. 814. The Sunday laws, the laws against gambling, against lotteries, against disorderly houses, the sale of liquors, the sale of oleomargarine, the sale of drugs, and many similar laws afford instances of the exercise of the police power for the complete suppression of a given line of employment, or for its restriction and control. The act of 1870 belongs to the latter class. It does not prohibit the business of insurance, but regulates it. It says to all persons interested: "If you wish to embark in this business, you must secure a charter of incorporation, so as to subject your business to the visitorial power of the state. If you will not do this, you must not engage in insurance against fire at all." This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under state supervision and control, by requiring all

who wish to enter the business to put themselves in a position where the insurance legislation of the state will reach them, and the insurance department of the state can supervise their business and compel observance of the law.

Without going further into the discussion, we may now state our conclusions applicable to the case before us: First. The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state. Second. The act of 1870 is a valid exercise of the police power. It does not prohibit, but regulates, the business. It excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike to entitle them to enter the business. Third. The qualification is reasonable. It is open to all under general laws. It is not burdensome. Its only effect is to secure adequate capital at the beginning, and state supervision during the continuance of the business. Fourth. Upon the special verdict, judgment should have been entered in favor of the commonwealth, and sentence should have been pronounced under the act of 1870. That this may now be done, the judgment is reversed, the record remitted, and a procedendo awarded.

DEAN J. (dissenting). The act of 4th of February, 1870, declares it to be a misdemeanor for any person to issue a policy of insurance against loss by fire or lightning without authority being expressly conferred so to do by a charter of incorporation issued according to law. The defendant, on 12th of March, 1894, issued a policy to James C. Kimball in the sum of \$1,000 indemnifying him against loss by fire on his household furniture, contained in his dwelling house in Philadelphia, without authority expressly conferred by an act of incorporation. For so doing, he was indicted and tried March 20, 1894. There was no dispute as to the facts, and the jury, in a special verdict, found them as stated. The court, being of opinion that the act was unconstitutional, entered judgment on the verdict for the defendant, and thereupon the commonwealth appealed.

Unquestionably, the legislature has the authority to enact any law not in conflict with the Constitution of the state or of the United States. The right to limit the transaction of the business

of fire insurance to incorporated associations is not in express terms forbidden; but the right of natural persons to make contracts of indemnity against loss by fire or shipwreck was for centuries before the adoption of the Constitution a common-law right. All the authorities, without a single exception, hold that, under the constitutional right to acquire, possess and protect property, there is, necessarily, included the right to make reasonable contracts concerning it, which contracts are protected by the Constitution. In this all agree; and all agree, further, that the legislature may, in the exercise of its police power, absolutely forbid contracts which are inimical to public interests; and, second, may adopt suitable regulations of contracts for the protection of the public. The business of fire insurance being one which, from its nature, involves contracts with large numbers of persons in all parts of the commonwealth, who have not the opportunities of gaining the information necessary to intelligent bargaining, for their better security the legislature may make such regulations as will protect them against fraud or imposition. It may require that all who desire to transact business with the public shall take out a license; shall make frequent reports of their financial condition; have fixed places of business, where service of process can be had on them; that they shall deposit with the treasurer or other officer of the commonwealth bonds or other securities in sufficient amount to guarantee those with whom they contract against loss; and, generally, may make all reasonable rules for the regulation of such business. But can the legislature absolutely forbid the making of such a contract by individuals, and confer on corporations a monopoly of such business? Is the business of fire insurance deleterious to the public? If so, the legislature may absolutely prohibit it. But no one contends that it is. On the contrary, it is admitted it is to the advantage of the public. The legislature admits this by expressly authorizing artificial persons to conduct it. If such contracts be not injurious to the public, and may not be altogether prohibited, then where is the authority to prohibit one class, natural persons, from entering into them, and especially empowering another and numerically a very much smaller class, artificial persons, to make them? In so doing, the state grants a monopoly in a particular business to a particular

class. As is said, in substance, in the Slaughterhouse cases, 16 Wall. 102; *Alger v. Thacher*, 19 Pick. 54; *Taylor v. Blanchard*, 13 Allen, 372, and many other cases: "All such grants relating to any known trade or manufacture have been held by all the judges of England to be void at common law, as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities."

A contract of indemnity against loss by fire being a common-law right, it cannot, by legislative grant, be monopolized by a small class, unless it has become of such public concern as requires its exercise by the state, or by a corporation to whom the state's power is immediately delegated. It may be admitted that the business of constructing and operating public highways for the carriage of goods and travelers is exclusively in the state, and is of such immediate public interest that it can be transacted only by the state and such corporations as the state may specially authorize. But to carry on this business at all involves a right of eminent domain, which the state alone can exercise or grant, and, therefore, it ought not to be exercised by private individuals. There is not, and never was, a right in the individual to take private property for the construction and operation of a public highway, on which to conduct for profit the business of transportation; but there never was a time that the individual had not the right to make a contract to indemnify his fellow against loss by fire. This act is not obnoxious to the Constitution because it authorizes corporations to insure against fire, but because it prohibits individuals doing a like business. It grants a monopoly of a particular business to a particular class; prohibits all others from engaging in it. This the legislature may, in the exercise of its police power, in some cases, do. It may declare that females shall not be employed in some avocations; that children under a certain age shall not be employed in mines or factories; that none but men of good repute shall sell liquor by retail; and the wisdom of such legislation is not a question which the courts can consider, for it is adopted to promote the health, morals and good order of the public. That in some of the states the legislature has restricted the business of banking to corporations has no analogy to the case in hand. The banking intended to be

restricted by the New York act was issuing of notes, receiving of deposits and discounting. In *People v. Utica Ins. Co.*, 15 Johns. 358, and *Bristol v. Barker*, 14 Johns. 205, it was held that the act was only a restraining and regulating act applying to associations of individuals; that as to them, to do a banking business, they must have corporate authority; that an individual was not prohibited from doing a banking business, except as to issuing bank notes. It has always been held to be within the police power of the legislature to restrict the issuing of notes intended to pass as money to corporations. It is a matter which concerns the entire public, who have no opportunity in the hurry of every-day business transactions of life to ascertain the value of the promise which is tendered as money. But, in a contract of indemnity, why should not the citizen make his contract when and where the price and security suits him best? Why should the legislature take from the whole people their common-law right of contract for insurance and grant it to a particular class? Where is there the semblance of the constitutional exercise of the police power in this? Under the Corporation Act of 1874 and supplements corporations for almost every business are authorized, such as supplying ice, printing and publishing, conducting hotels, drove yards, livery stables, lumbering, quarrying, mining, brewing, distilling, improvement and sale of real estate. In fact, almost every kind of business can be transacted by incorporated companies. All concern the public. If this act be constitutional the legislature can prohibit the transaction of any business if not conducted by corporations under the act of 1874, and, under the pain of imprisonment, forbid the individual engaging in any business whatever.

It is paternalism to assume that citizens are incapable of prudently contracting with reference to their property without an express grant of the state, in the shape of corporate franchise, to one of the contracting parties. It is an assumption that the citizen is a child, needing the tutelage and protection of the legislature in the ordinary affairs of business life; or else it is a species of tyranny in government, like that of Turkey, where the rights to produce, manufacture and trade are all the subject of grant from the sultan. If the exercise of the right of contract to indemnify be injurious to the public, then it ought to be prohib-

ited; if beneficial, it ought not to be monopolized by a few. The rule to be deduced from *Budd v. New York*, 143 U. S. 528; 12 Sup. Ct. Rep. 468 (the Elevator cases), the Sinking Fund cases, 99 U. S. 700, and all the cases where the police power of the state is discussed, is that, while a business affected by a public interest may be regulated, yet, when not inimical to the health, morals or safety of the people, it cannot be prohibited. I do not think an exclusive grant to a class is regulation. That is prohibition of all others, and is, therefore, unconstitutional. The judgment, in my opinion, should be affirmed, and appeal dismissed.

STERRETT, Ch. J., and GREEN, J., concur in this dissent.*

In *State v. Scougal*, 6 Am. R. R. & Corp. Rep. 165, it was held by the Supreme Court of South Dakota that a statute prohibiting the doing of a banking business, except by corporations, and providing for the formation of corporations for that purpose, was invalid as violating both the State and Federal Constitutions, in the particulars alleged in the principal case. Authorities on the question are collected in the note, 6 Am. R. R. & Corp. Rep. 184.

NEW YORK, LAKE ERIE & WESTERN R. Co. v. PENNSYLVANIA.

(Supreme Court of the United States, May 14, 1894.)

1. CONSTITUTIONAL LAW. IMPAIRING OBLIGATION OF CONTRACT. VALIDITY OF LAW REQUIRING FOREIGN RAILROAD CORPORATION TO DEDUCT FROM INTEREST ON ITS BONDS OWNED BY RESIDENTS, THE TAX PAYABLE ON SUCH BONDS. A New York railroad corporation was authorized to construct its railroad through a portion of Pennsylvania upon certain terms and conditions, including the payment of a certain sum annually to the state. The road was built and the terms and conditions complied with. Held, that a contract was thereby created between the state and the company which could not be impaired by the imposition of new burdens or conditions by the state beyond such reasonable regulations as it might deem proper, touching the management of the business done and the property owned by the railroad company in Pennsylvania which do not materially interfere with or obstruct the substantial enjoyment of the rights previously granted.

2. An act of Pennsylvania, requiring the company to deduct from the interest payable on bonds held by residents of that state, the tax levied on such bonds, the bonds having been made and being payable in New York, would operate as an impairment of the contract between the company and the state, and is void.

* Reported in 80 Atl. Rep. 217.

8. The money in the hands of the company in New York is beyond the jurisdiction of Pennsylvania, and the latter state has no power to say how the corporation shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes, or to forbid it to perform its contract with its creditors according to its terms and according to the law of the place of performance.

THIS writ of error brings up for review a judgment of the Supreme Court of Pennsylvania, affirming a judgment of the Court of Common Pleas of Dauphin county, in that state, against the New York, Lake Erie and Western Railroad Company, a New York corporation, for the amount of certain taxes assessed by and alleged to be due to Pennsylvania for the year 1888, in respect to certain bonds and evidences of indebtedness issued by that company, and which were ascertained by the court to have been held and owned by residents of that state.

The judgment of the Court of Common Pleas was affirmed upon the authority of *Com. v. New York, L. E. & W. R. Co.*, 129 Penn. St. 468; 18 Atl. Rep. 412, and *Com. v. Lehigh Val. R. Co.*, 129 Penn. St. 429; 18 Atl. Rep. 406, 410.

The state based its claim against the railroad company upon a statute enacted on the 30th day of June, 1885. The company insisted that that statute, if applied to it in respect to taxes due and payable in Pennsylvania by residents of that state, was repugnant to the Constitution of the United States.

The relations existing between the plaintiff in error, as the successor of the New York and Erie Railroad Company, and the commonwealth of Pennsylvania, at the time of the passage of the statute of 1885, are shown by legislative enactments to which some reference should be made.

From the preamble of a statute approved February 16, 1841, it appears to have been represented to the general assembly of Pennsylvania that the New York and Erie Railroad Company, having authority to construct a railroad from the city of New York to Lake Erie through the southern tier of counties in the state of New York, was hindered in building its road through Broome county, bordering on Pennsylvania, by a mountain of such magnitude as to require tunneling or to be surmounted by stationary power at immense expense, and that a level and easy route could be established if the proposed road followed the valley of the Susquehanna river in Pennsylvania, a distance of

about fifteen miles, and near to Broome county, N. Y. In consequence of these representations, and to maintain "amity between adjoining states in respect to their internal improvement operations," it was provided that the railroad company "shall have full power to extend their road through such portion of the county of Susquehanna as, in the proper construction of their road, they may find it necessary." This statute contained numerous provisions for the protection of both the railroad company as well as the public, one of which provided that, if any buildings, fences, timbers or other property, situated in Susquehanna county, should be destroyed by fire occasioned by sparks falling from locomotive engines upon the road, the company should be liable to make full compensation for all damages sustained in consequence of such fire (§ 11); a liability which, according to the statement of counsel, Pennsylvania does not impose upon its own corporations. As these provisions do not affect the particular questions now before us, they need not be here set out.

By an act of the general assembly of Pennsylvania, approved March 26, 1846, and supplementary to that of 1841, authority was given the New York and Erie Railroad Company to construct its road through a portion of Susquehanna and Pike counties. That act, among other things, required the company to so regulate its tolls that the charge on anthracite coal should not exceed one and one-half cents per ton per mile. § 3. It also made it the duty of the president and managers of the company, as soon as its railroad was completed through Susquehanna and Pike counties, to prepare a full and accurate account of the costs of that portion of the road within Pennsylvania, and communicate the same to the auditor-general of the commonwealth; and after the road was completed and in operation to Dunkirk, or became connected at the western end with any other improvement extending to Lake Erie, the company should pay into the treasury of this state, annually, in the month of January, \$10,000, any neglect or refusal to make such payment to work a forfeiture of the rights and privileges granted by the act. § 5.

That act also provided that the stock of the company to an amount equal to the costs of the construction of that part of its road situated in Pennsylvania should be subject to taxation by that state, in the same manner, at the same rate, as other similar

property; and the company should pay into the treasury of the commonwealth any tax to which that proportion of stock was liable, and make, annually, a statement to the legislature, under oath, of its affairs and of the business done on said road during the previous year, such statement to contain a full and accurate account of the number of passengers, amount and weight of produce, merchandise, lumber, coal and minerals transported on its said road, east of Dunkirk, and west of Piermont. § 6.

Under the authority of these statutes the railroad company constructed, and has ever since maintained, its road through parts of Pennsylvania. Of the company's road extending from Jersey City to Dunkirk and Buffalo, a distance of 446 miles, about forty-two miles are within the counties of Pike and Susquehanna.

The taxes in question were imposed under the above statute of 1885, which assessed an annual tax of three mills on the dollar for state purposes on all mortgages, money owing by solvent debtors whether by promissory note, or penal or single bill, bond or judgment, also on all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done, and obligations given to banks for money loaned and bank notes), on all public loans or stocks (except those issued by Pennsylvania or the United States), on all moneys loaned or invested in any other state, and on all other moneyed capital in the hands of individual citizens of Pennsylvania, the property and interests so taxed being exempted from all taxation, except for state purposes, and the act not to apply to building and loan associations. P. L. 193, § 1.

By the 4th section of the act it was provided that "hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this commonwealth, or the laws of any other state, or of the United States, and doing business in this commonwealth, upon the payment of any interest on any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this commonwealth, and held by them, to assess the tax imposed and provided for state purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually, on the first Monday in November to the auditor-general the amount of indebtedness of the corporation owned by residents of this commonwealth, as nearly as the same

can be ascertained ; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid, and return the same into the state treasury within fifteen days after the thirty-first day of December in each year ; and his compensation for his services shall be the same that city and borough treasurers receive for similar services ; and for every failure to assess and pay said tax and make report as aforesaid the auditor-general shall add ten per centum as a penalty to the amount of the tax ; in payment of said tax by a corporation, the bonds, certificates or other evidence of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

In November, 1888, the treasurer of the railroad company made the following report under oath to the auditor-general of Pennsylvania :

"In accordance with the provisions of the fourth section of the act of June 30, 1885, and the requirements of your department, as treasurer of the New York, Lake Erie and Western Railroad Company, I make the following report of the indebtedness of said company for the year ending first Monday of November, 1888 :

"Nominal value of all scrip, bonds and evidence of indebtedness	\$78,573,485 10
"Nominal value of all scrip, bonds and evidences of indebtedness known to be owned by residents of Pennsylvania.....	None.
"Nominal value of all scrip, bonds and evidences of indebtedness none of which are known to be owned by residents of Pennsylvania	\$78,573,485 10."

This report was accompanied by a communication from the treasurer of the railroad company, stating that it was made in deference to the wishes of the auditor-general, but under protest, and not in admission of any authority contained in the 4th section of the act of 1885.

In 1890 the commonwealth, by its attorney-general, proceeded against the railroad company in the Court of Common Pleas of Dauphin county to recover the amount claimed from it under

section 4 of the act of 1885, for the year ending first Monday of November, 1888, for taxes on its scrip, bonds and certificates of indebtedness held by residents of Pennsylvania. The amount so claimed was \$234,490.86, with twelve per centum interest from sixty days after the settlement of the tax account by the auditor-general. That officer settled the account upon the basis that the railroad company was subject to taxes in Pennsylvania on the nominal value of all the scrip, bonds and certificates of indebtedness issued by the company, and then outstanding, to wit, \$78,573,485.10. Having no information whatever as to ownership, the auditor-general arbitrarily assumed in the settlement that all the company's outstanding scrip, bonds and certificates of indebtedness were owned by residents of Pennsylvania.

A trial by jury was dispensed with by the parties, and the case was heard by the court. From the evidence in the cause the court found the following facts:

"(1) Defendant is a corporation chartered by the state of New York, and having its principal office and place of business in the city of New York. It has and exercises the right of way, under a special act of the legislature of the state of Pennsylvania, to run its railroad for somewhat more than thirty miles through the state of Pennsylvania, for which it pays annually to the state the sum of ten thousand dollars. (2) The settlement appealed from is based upon a report made by the treasurer of defendant to the auditor-general of Pennsylvania for the year 1888, which contains a detailed statement of the several issues of bonds, scrip and certificates of indebtedness by defendant, and the corporation whose successor it is, amounting in all to \$78,573,485.10, in which it is stated that none of the indebtedness is known to be owned by residents of Pennsylvania, and that it is believed by the officers of the company that nearly all is owned by nonresidents of Pennsylvania. (3) In the settlement appealed from, defendant is charged with tax upon the nominal value of all scrip, bonds and certificates of indebtedness issued by it, and the corporation whose successor it is, and owing by it, amounting to the sum of \$78,573,485.10, as stated in said report. (4) All the evidences of indebtedness owing by defendant were created and issued under authority granted by the legislature of the state of New York, and were issued, sold and delivered in the city of

New York, in said state, or in London, England, and the interest accruing from time to time thereon is payable and paid in said city of New York and in London. The right to the interest is evidenced by coupons payable to the bearer, which, when due, are separated from the bonds, and are presented for payment at the office of defendant in the city of New York by banks, bankers and their messengers, on behalf of themselves and their correspondents in other places, by whom the coupons have been transmitted, either as cash or for collection; and it is practically impossible for the treasurer or other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owner of the bonds from which they have been separated, because of the large number of coupons presented at the dates when they become due, the whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason that the bankers and their messengers, when they present the coupons, in very many instances do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer, and a refusal of the treasurer of the company to pay the coupons on presentation, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for nonpayment. Some of the evidences of indebtedness are coupon bonds issued and payable to bearer, and others are coupon bonds which may be registered or not, at the option of the holders or owners. (5) Holders of the evidences of indebtedness of defendant are entitled to vote for directors of this company, and a register is kept in the office of defendant, in which all holders of such evidences of indebtedness are required to register between sixty and thirty days prior to any election for directors at which they desire to vote. The register for the year 1888 shows an ownership of bonds to the amount of \$28,562,700, of which we find that \$338,000 were owned by residents of Pennsylvania, but this ownership does not appear on the register. (6) A record of registered bonds is also kept in the office of defendant, and in 1888 there were registered \$11,124,300 in value of

bonds. Of this amount \$2,054,000 were owned by residents of Pennsylvania, \$1,551,000 of which were owned by Pennsylvania corporations, leaving \$503,000 which were owned by individual residents of Pennsylvania. (7) There is no evidence in this case from which we could find that any particular bonds, other than those which make up the two amounts of \$338,000 and \$503,000, as above stated, were held or owned, during the year 1888, in Pennsylvania; nor is there any evidence tending to show that the treasurer of defendant, at the time the coupons were paid, could know that any, and, if any, which, of the coupons, other than those which belonged to the bonds above specified, belonged to bonds held or owned in this state; and we, therefore, do not find that there were any other bonds, or any greater amount of bonds, held in Pennsylvania, during the year for which the tax is claimed in this settlement, than the bonds specified in findings of fact numbers five and six."

Subsequently, the court found the following additional facts: "(1) The treasurer of defendant is, and was in 1888, a resident of the state of New York. (2) The legislation of the state of New York constituting the charter of the company, and in pursuance of which the bonds and mortgages were issued, is silent upon the subject of their taxation by the state of Pennsylvania, or the assessment or collection of a tax thereon by the company or its officers, and that the legislation of the state of Pennsylvania authorizing the construction of a portion of its road through a portion of said state is silent upon the subject of the taxation of the bonds and mortgages of the company, or of the collection of a tax thereon by the company or its officers. (3) The railroad of defendant extends from New York city to Buffalo, a distance of 446 miles, and that, so far as the state of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to, or from and to, other states, into, out of or through the state of Pennsylvania."

It was adjudged that the defendant was liable for the tax in respect of the bonds held and owned in 1888 by residents of Pennsylvania, represented by the two items of \$338,000 and \$503,000, aggregating \$841,000, and not on any other or greater amount of bonds; and that view was approved by the Supreme Court of Pennsylvania.

M. E. Olmsted and E. J. Phelps, for plaintiff in error. *Jas. A. Stranahan*, Deputy Attorney-General, and *W. U. Hensel*, Attorney-General, for Commonwealth of Pennsylvania.

HARLAN, J. (*after stating the facts*). The principal question in the case is whether the commonwealth of Pennsylvania may, consistently with the Constitution of the United States, impose upon the New York, Lake Erie and Western Railroad Company the duty, when paying in the city of New York the interest due upon scrip, bonds or certificates of indebtedness held by residents of Pennsylvania, of deducting, from the interest so paid, the amount assessed upon bonds and moneyed capital in the hands of such residents of Pennsylvania.

The court recognizes the far-reaching consequences of its determination of this question, and has, therefore, bestowed upon it the careful consideration which its importance demands.

It is contended that, in our examination of this question, there are certain principal facts found by the Court of Common Pleas which, so far as they are pertinent, must be accepted as the basis of any decision that may be rendered. *Com. v. Westinghouse Electric & Manufg. Co.*, 151 Penn. St. 265; 24 Atl. Rep. 1107, 1111, and authorities there cited. These facts are: That all the evidences of debt owing by the railroad company were created and issued under the authority of the state of New York, and were sold and delivered in that state or in London; that the interest on such indebtedness is payable and paid in the cities of New York and London; that the interest coupons are payable to bearer, and, when due, are separated from the bonds and presented for payment at the company's office in New York, by banks and their messengers, on their own behalf or on behalf of their correspondents in other places, by whom the coupons have been sent either as cash or for collection; and that it is practically impossible for the company's officers, at the time the coupons are presented, to ascertain the residence of the owners of the bonds from which the coupons were detached, the number of coupons due semi-annually amounting to more than 150,000, and those presented in a single day often amounting to 20,000, and the bankers and their messengers, at the time of presenting their coupons, not knowing, in very many instances, who own the bonds, and, as

the coupons are payable to bearer, could not be compelled to disclose the ownership of either bonds or coupons.

In our judgment, however strongly those facts may indicate the injustice that would be done to the railroad company by subjecting it to the provisions of the 4th section of the statute of 1885, and although such facts are important in some aspects of this case, to be presently examined, they are not, in themselves, decisive of the question to be here determined. It is not enough to justify the overthrow, by judicial decision, of a state law imposing taxation, simply to show that such law operates unjustly. So far as the courts of the Union are concerned, they must recognize, and, when necessary to do so in cases within their jurisdiction, enforce the statutes of the several states, unless those statutes encroach upon legitimate national authority, or violate some right granted or secured by the Constitution of the United States. *Kirtland v. Hotchkiss*, 100 U. S. 491, 498. The question here is not one of mere injustice done to the railroad company, but one of power or authority in Pennsylvania to compel that corporation to do what the act of 1885 is held by the state court to require at its hands in respect to taxes upon bonds and moneyed capital in the hands of individual citizens of Pennsylvania.

The fundamental propositions upon which the argument of counsel for the state is based are that the New York, Lake Erie and Western Railroad Company is a private corporation of another state; that it has no right to do business in Pennsylvania without the permission of that state; and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that commonwealth. This view was expressed by the Supreme Court of Pennsylvania in *Com. v. New York, L. E. & W. R. Co.*, 129 Penn. St. 463; 18 Atl. Rep. 412, in the following language: "It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this state that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this state, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company. It simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The

legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the state, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition, implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted. *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; 5 Sup. Ct. Rep. 681. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this state as a matter of grace, and not of right."

It is found as a fact in this case that, so far as Pennsylvania is concerned, the business of the railroad company consists chiefly in the transportation of freight and passengers from or to other states, into, out of or through that state. We are not sure that the court below, or counsel here, intended to be understood as claiming that it was competent for Pennsylvania to make compliance with the 4th section of the act of 1885 a condition of the right of the railroad company to continue the use of its track in Pennsylvania for purposes of interstate commerce. Some of the considerations necessary to be borne in mind when any such question arises for determination are adverted to in the recent decision of this court in *Crutcher v. Kentucky*, 141 U. S. 47, 59; 11 Sup. Ct. Rep. 851. But no such question is here presented. The commonwealth of Pennsylvania has not attempted to impose any such condition upon the corporations embraced by the statute of 1885.

Assuming, for the purposes of this case, the correctness of the position taken by the learned attorney-general of Pennsylvania, that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the 4th section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846,

and by what was done by that company upon the faith of those acts. Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. Those terms have been fully indicated in the statement of this case, and need not be repeated. When the state, by the acts of 1841 and 1846, gave this assent, the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those acts, was not overlooked, for by the 7th section of the act of 1846, into which, by its 2d section, all the restrictions, prohibitions, privileges and provisions contained in the act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved, "if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges [provisions] of this act." And the question whether the privileges granted had been misused or abused, or the provisions of the act violated, was to be determined by *scire facias* issued out of the Supreme Court of Pennsylvania. § 7. There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of that commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the state, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situate within its limits.

The argument in behalf of the state leads logically to the conclusion that notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road in that state, Pennsylvania could, in its discretion, change those terms, and impose any others it deemed proper. If the state amended those acts so as to

increase the sum to be paid annually into the state treasury, as a bonus, from \$10,000 to \$100,000, the argument made by its attorney-general would sustain such legislation upon the ground that the state, at the outset, could have exacted the larger amount from the company as a condition of its entering the state with its road. To any view which assumes that the state could — so long, at least, as the railroad company performed the conditions of the acts of 1841 and 1846 — burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent. No such terms as those named in the act of 1885 were imposed prior to the building of the road in Pennsylvania, and, the road having been constructed in that state upon the faith of the legislation of 1841 and 1846, and with the assent of the state, given for a valuable consideration paid by the company, its maintenance in Pennsylvania cannot be made the pretext for imposing such conditions as those prescribed in the act of 1885.

But it is said that regulations prescribed after the construction of the road, applicable to railroad companies doing business in the state, such regulations being reasonable in their character, should be deemed to have been within the contemplation of the parties when those acts were passed, and, therefore, not in violation of the agreement under which the company entered the state for the purpose of transacting business there; and that it should not be assumed that the state intended to surrender or bargain away its authority to establish such regulations.

Of the soundness of this general proposition there can be no doubt, in view of the settled doctrines of this court. The contract in question left unimpaired the power of the state to establish such reasonable regulations as it deemed proper, touching the management of the business done and the property owned by the railroad company in Pennsylvania, which did not materially interfere with or obstruct the substantial enjoyment of the rights previously granted. But the 4th section of the act of 1885 is not within that category. It assumes to do what the state has no authority to do — to compel a foreign corporation to act, in the state of its creation, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. Under the sanc-

tion of the laws of New York the defendant corporation executed, prior to the passage of the act of 1885, bonds, with interest coupons attached, payable in that state and not elsewhere. It gave mortgages to secure the payment of those bonds and coupons, according to their tenor. Neither the bonds nor the coupons nor the mortgages contain anything that would, in law, justify the company in refusing to meet its obligations, according to their terms, and without deduction on account of taxes due from the holders of such bonds or coupons residing in another state. We have seen that the bonds and coupons in question were payable to bearer, and that it was practically impossible for the company, when the coupons were presented for payment, to ascertain who, at that time, really owned them, or the bonds from which they were detached, or whether the coupons were owned by the same person or corporation that owned the bonds. This fact is quite sufficient to show the unreasonable character of the regulations attempted to be applied to this company under the act of 1885. This view is strengthened by the fact that the coupons were negotiable instruments, and, being detached from the bonds, were separate obligations, passing by delivery, upon which an action could have been maintained by the holder, independently of the ownership of the bonds. Such is the settled doctrine of commercial law as declared by this court. *Clark v. Iowa City*, 20 Wall. 583; *Hartman v. Greenhow*, 102 U. S. 672, 684; *Koshkonong v. Burton*, 104 U. S. 668. And it is the doctrine of the Supreme Court of Pennsylvania, which has declared that "the coupons of railroad bonds are negotiable instruments, and may be sued on by the holder separately from the bonds, and interest from the date of demand and refusal of payment may be recovered." *County of Beaver v. Armstrong*, 44 Penn. St. 63.

If Pennsylvania, in order to collect taxes assessed upon bonds issued by its own corporations, and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known at the time by the corporation paying the interest to be residents of that state (and it may be admitted in this case that the state, if not restrained by a valid contract to which it was a party, could establish such a regulation), it does not follow that

the state may impose upon foreign corporations because of their doing business in that state with its permission given for a valuable consideration any duty in respect to the mode in which they shall perform their obligations in other states.

The New York, Lake Erie and Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the state of New York. The money in the hands of the company in New York, to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money in another state shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319; *Railroad Co. v. Jackson*, 7 Wall. 263; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax*, 18 Wall. 206.

The fallacy of the contrary view is in the assumption that this railroad company, by purchasing from Pennsylvania the privilege of constructing and operating a part of its road through the territory of that state, thereby impliedly agreed to submit to such regulations as that state should, at any subsequent period, adopt in respect to the mode in which it should, in the state of New York, apply money in its hands in discharge of the obligation to pay interest to the holders of its bonds residing in Pennsylvania. But, for the reasons stated, this assumption is unwarranted by any sound principle of law or by the circumstances under which the railroad company obtained the assent of Pennsylvania to build and maintain its road through that state.

It is due to learned counsel who argued this case that something be said before concluding this opinion about certain authorities upon which great reliance was placed.

Reference was made by counsel for the company to the decis-

ion of this court in the case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 320, which case involved the validity of a Pennsylvania statute of 1868, requiring corporations, created by and doing business in that state, to deduct from the interest paid on its obligations the tax assessed on such interest by the state. It was attempted to make that statute applicable to interest payable on bonds held by nonresidents of Pennsylvania. This court said: "The tax laws of a state can have no extra-territorial operation, nor can any law of a state inconsistent with the terms of a contract made with, or payable to, parties out of the state, have any effect upon the contract while it is in the hands of such parties or other nonresidents of the state. * * * It is a law which interferes between the company and the bondholder, and, under the pretense of levying a tax, commands the company to withhold a portion of the stipulated interest, and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms, and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent upon every dollar, and pay it into the treasury of the commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property."

If the present case involved any question as to the authority or duty of the railroad company to deduct anything from the interest paid on its scrip, bonds or certificates of indebtedness, when held by nonresidents of Pennsylvania, the case of *State Tax on Foreign-Held Bonds* would be decisive against the state. But no such question is here presented. The statute of 1885 only applies to

scrip, bonds or certificates of indebtedness issued to, and held by, residents of Pennsylvania.

Counsel for the state insisted that the present case is controlled by *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; 10 Sup. Ct. Rep. 553, reaffirmed in *Jennings v. Coal Co.*, 147 U. S. 147; 13 Sup. Ct. Rep. 282. It is only necessary to observe that the corporations which complained in those cases of the tax assessed, under a Pennsylvania statute, upon their loans held by residents of Pennsylvania, were Pennsylvania corporations. No question arose in either of those cases as to the authority of Pennsylvania to make a corporation of another state an assessor or collector of taxes assessed by or under the authority of Pennsylvania against residents of Pennsylvania. Nor does the case now before us involve any question as to the extent to which the state may tax property within its limits belonging to the railroad company.

The views we have expressed are sufficient for the disposition of the case, without considering other grounds upon which, it is contended, the judgment below was erroneous.

The judgment of the Supreme Court of Pennsylvania is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.*

The decision of the Pennsylvania court in the principal case is reported in 145 Penn. St. 38; 22 Atl. Rep. 212. The validity of the same law was again affirmed, as respects foreign corporations, in *Commonwealth v. Delaware & Hudson Canal Co.*, 150 Penn. St. 245; 24 Atl. Rep. 599. In *Jennings v. Coal Ridge Imp. & Coal Co.*, 147 U. S. 147; 13 Sup. Ct. Rep. 282, the defendant being a Pennsylvania corporation, it was held that the Pennsylvania statute (Act June 30, 1885, § 4) requiring the treasurer of each private corporation doing business in the state, upon the payment of interest on any bond, etc., issued by such corporation, to assess the state tax of three mills upon the "nominal value" of such evidence of debt, deduct the same from the interest paid and turn it into the state treasury, is not in contravention of the fourteenth amendment to the Constitution of the United States, as taking property without due process of law, or as providing for an unjust discrimination in favor of persons owning bonds of foreign corporations, which by the general laws of the state are taxed at their actual value.

* Reported in 153 U. S. 628; 14 Sup. Ct. Rep. 952.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. UNITED ELECTRIC R. CO.

(Supreme Court of Tennessee, March 10, 1894.)

1. INJURY TO TELEPHONE LINES AND PLANT BY ELECTRIC RAILWAY ON SAME STREET. AN ELECTRIC STREET RAILWAY AN ORDINARY STREET USE. An electric street railway, operated by the trolley system, and for the transportation of passengers only, whose tracks conform to the surface of the street, is not an additional servitude upon the fee of the street, but it is a legitimate and ordinary use of the street within the meaning of a statute, granting to a telephone company the right to use the streets with its lines of poles and wires, but so as not to obstruct the ordinary use thereof.

2. RELATIVE RIGHTS OF TELEPHONE COMPANY AND ELECTRIC RAILWAY COMPANY OCCUPYING SAME STREET. An electric railway company was authorized to occupy a street upon which a telephone line had been previously constructed under authority of law, with a proviso that it should not obstruct the ordinary use of the street. Held, that each must exercise its rights with that careful and prudent regard for the rights of the other which the law enjoins, and which is embodied in the maxim, *sic utere tuo ut alienum non laedas*. Both being authorized by the legislature, their right to occupy and use the streets are co-ordinate; each, within its own sphere, is independent of the other, and the right of neither is subordinate to the other, except as made so by the legislature.

3. INJURY TO TELEPHONE COMPANY BY THE PHYSICAL OBSTRUCTION CAUSED BY THE POLES AND WIRES. Where the poles and wires of an electric railway company were erected on both sides of a street and so as to interfere with the poles and wires of a telephone company previously erected on one side of the same street, in consequence of which the latter company was obliged to put in higher poles, it was held that, as the railway company might reasonably have avoided such interference, by using a single line of poles in the middle or on one side of the street, the latter company was liable for the injury caused by such interference, and a recovery for the expense incurred in repairing such injury was allowed.

4. INJURY BY INDUCTION. In the case stated the operation of the telephone plant was interfered with by induction caused by the proximity and parallelism of the wires and the varying intensity of the current in the railway wires. The only remedy for this was to destroy the parallelism of the wires, which the telephone company did. Held, that, as the railway company could not exercise its right without creating this induction, and as its use of the street was an ordinary use, which the telephone company was forbidden to obstruct, the placing of the telephone wires so that induction would necessarily result, amounted to an obstruction of the ordinary use of the street, and that the railway company was not liable for the consequences of such induction.

5. INJURY BY CONDUCTION. Both the telephone and electric railway used the earth as a return circuit. The electricity generated by the railway company escaped through the ground to a distance of half a mile on either side of

its lines, found the telephone lines and almost paralyzed the use of its instruments. It appeared that the only remedy for this interference was for one of the companies to put in a metallic return circuit, which the telephone company proceeded to do. Held, that, as the railway plant might have been constructed and operated, without any unreasonable expense, so as to avoid injury by conduction, the railway company was liable for such injury to the telephone property.

6. A telephone company whose line is in operation is not bound to protect itself from the probable injurious consequences to it, from the building of an electric railway, by making such changes in its existing plant as would obviate the effects of conduction.

7. INJURY BY CONDUCTION AMOUNTS TO A TAKING. The injury to the telephone plant by conduction constitutes such an invasion of the company's property as amounts to a taking for public use, and renders the railway company liable for the damage thereby inflicted.

8. GENERAL DUTY AS TO ELECTRICITY ARTIFICIALLY GENERATED. The lawful, harmless and accustomed use upon one's own land of electricity cannot be lawfully obstructed or impaired by the injurious act of another, in generating and permitting the escape of electricity, of unusual or unnatural power or volume, so as to disturb the usual and natural electrical conditions upon neighboring property and thereby cause injury and loss to others.

Vertrees & Vertrees, for plaintiff. *J. C. Bradford* and *E. H. East*, for defendant.

G. W. PICKLE, Sp. J. This is a suit by a telephone company against an electric street railway company to recover damages inflicted upon the telephone plant by the contiguous railway plant. The plaintiff has appealed from an adverse judgment and assigned errors. The facts are practically undisputed, and so far as they are material or pertinent to the questions to be determined are as follows:

The plaintiff, a Kentucky corporation, had, prior to 1889, established in the city of Nashville, a telephone plant upon the "single wire" plan or system. The earth, under this system, is used as the return conductor to complete the electrical circuit and the overhead "single wire" must have earth connections at both ends, at the "exchange" and at the subscribers. These earth connections of plaintiff's wires were effected upon private property at both ends, upon the company's property at the "exchange," and upon the subscriber's property, by his consent, at the other end. The poles upon which plaintiff's wires were stretched were planted in the public streets by permission of the city council and by authority of a general statute of this state which empowers tele-

phone and other like companies, both foreign and domestic, to construct, operate and maintain, upon consideration of certain benefits conceded to the state and general government, their lines, "along and over the public highways and streets of the cities and towns of this state. Provided that the ordinary use of such public highways, streets, etc., be not thereby obstructed." Acts 1885, chap. 66. In telegraphy, of which telephony is but another form, it has been universal practice for half a century to use the earth as the "return circuit." The plaintiff's plant was constructed in accordance with an approved system and the one chiefly used in all the large cities of the United States. The electric currents required and used in the operation of plaintiff's plant cause no hurtful disturbance anywhere of natural electric conditions. The plaintiff's plant, thus constructed, was in perfect condition and successful operation, rendering satisfactory service to its patrons, when, in 1889, the defendant, a domestic corporation, having obtained control of the street railways of Nashville, which had, with one unimportant exception, been operated by horse power, constructed and put into operation thereon a "single trolley" overhead electric railway system. Defendant's action in this particular was authorized by general public statutes of the state, which provided that street railway companies that had hitherto used animal power for the operation of their cars, might, with the consent of the city authorities, adopt electricity as a motive power. Acts 1887, chap. 65; 1889, chap. 40. The required consent of the city authorities was obtained by defendant. While there are two systems of electric street railways, the "single trolley" system and the "double trolley" system, the former is the more approved and satisfactory and the one in general use. It is better adapted than the "double trolley" system to single track railways like defendant's. It is likewise cheaper. The defendant's plant was properly constructed and equipped according to the "single trolley" system. The earth is used as a "return circuit" in the operation of street railways constructed upon the "single trolley" plan, but not for those operated upon the "double trolley" plan. The defendant, in the operation of its plant, generates or collects electricity in such unusual quantities, and applies and uses it in such violent, turbulent and varying currents as to produce a nonnatural and

disturbed condition electrically, not only within the streets, but for the distance of half a mile on either side. The plaintiff's entire plant was for a time paralyzed, and its utility destroyed by the construction and operation of defendant's plant or system.

The injuries, so fatal to plaintiff's franchise and plant, resulted by several methods that it is important to describe. First, injury resulting from what is known as conduction or leakage. Currents of electricity of great strength and force are generated and applied by defendant in the propulsion of its cars. These abnormal currents of the electrical fluid are poured out, or permitted to escape into the streets. They overflow the streets and invade private property for half a mile on either side, and, finding the earth connections of the telephone wires at the exchange, and at the subscribers, pass up into those wires and the telephone instruments, and, by reason of their great force and volume, substantially destroy the utility of the telephone plant. This interference can be obviated in only one way, viz., by a metallic "return circuit" for one of the plants. The only metallic "return circuit" for a railway yet discovered is that known as the "double trolley" system. The "double trolley" system is more expensive than the "single trolley" system, and inferior in other respects for the operation of single track railways. A recent invention, known as the "McLeuer device" has been proved by experience to be an effective remedy for the disturbances caused by conduction. This "McLeuer device" consists of a large copper wire, supported on poles, with which the outgoing telephone wires are connected at both ends, and which serves as a "return circuit" instead of the earth. The "McLeuer device" is the most effective and least expensive remedy that has been discovered for the disturbances caused by conduction. The plaintiff was compelled, in order to reclaim its plant, to put in this "McLeuer device" at a cost of \$3,660.58. Second, injury resulting from what is called induction or parallelism. The wires of the telephone company and of the railway company are parallel upon some of the streets. It is a physical fact of much importance in electric mechanism that when two wires of two circuits are parallel to each other, and there is a current of varying intensity on one of them, this will produce in the other, in the opposite direction, a current of electricity of similar varia-

tion. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of the parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and intensity, owing to the drain upon the store of electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, wherever the telephone wire is parallel with the trolley wire and feed wire, there is induced upon the telephone wire a current whose variation corresponds with the variations of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable. But one practicable remedy has been discovered for the disturbances caused by induction; that is, to destroy the parallelism of the wires of the two circuits. This remedy is practicable for the telephone company alone. The expense incurred by plaintiff on this account was \$856.30. Third, the plaintiff expended \$816 in putting up higher poles on Main street, in consequence of conflict produced by the erection of defendant's poles and wires. The plaintiff's poles occupied one side of Main street and defendant's poles were put up on both sides of said street and conflicted with plaintiff's poles and wires so as to render it necessary for plaintiff to put in new and higher poles. The majority of the court think that the defendant could have reasonably avoided this conflict by supporting its wires upon a single line of poles with arms erected through the middle of the street or upon the opposite side from the telephone poles and wires. Judge SNODGRASS and the writer of this opinion do not concur in this finding of fact. The contention of the parties will be stated and disposed of in order, and so much of the court's charge as may be deemed material will be stated in the proper connections.

The fact that plaintiff sustained loss in consequence of the construction and operation of defendant's plant is admitted by defendant. The amount of that loss is accurately ascertained and is not a matter of controversy. The sole question for determination is defendant's liability for that loss. The loss by conduction is distinct from that resulting from induction, and

from conflict of the poles and wires of the two systems. The two items last named, loss by induction and by conflict with poles and wires, may be conveniently considered together as involving the same or similar questions. But loss by conduction will be considered apart from other matters.

First. Is defendant liable for loss that plaintiff sustained from induction and from conflict of the poles and wires of the two systems? This loss, unlike that caused by conduction, occurs upon and within the streets and is a direct and immediate result of plaintiff's occupation and use of the streets simultaneously with defendant, and would be obviated or remedied by the withdrawal of either party from the streets. It is important to ascertain the exact status and relative rights of these companies as regards their use and occupation of the public streets. Both are quasi public corporations of the same general character. Both serve important public ends and needs, and are equal candidates for public favor. Both derive their rights and franchises from the same source, a public general statute, and exercise them by permission of the same city authorities. The legislature intended that both should continue to exist under conditions favorable to the accomplishment of the purposes of their creation. No purpose to sacrifice one for the benefit of the other is apparent. It is, therefore, not quite accurate to say that defendant has the dominant and plaintiff a subservient use of the streets. Their respective rights to occupy and use the streets are co-ordinate. Each within its own sphere is independent of the other. The defendant's right is to use the streets for the erection and operation of an electric railway. Acts 1887, chap. 65; Acts 1889, chap. 40. And this, it is insisted, is a strictly legitimate and ordinary street use. The plaintiff's right is to use the streets incidentally in the erection and operation of a telephone plant, with the proviso that the ordinary use of the streets be not thereby obstructed. It is perfectly clear that no conflict can occur between these companies in the use of the public streets if each shall remain within its proper sphere, and exercise its power with that careful and prudent regard for the rights of the other which the law enjoins. The defendant must exercise care and prudence to avoid injury to plaintiff, and plaintiff must not obstruct defendant's use of the streets if that be an "ordinary use."

Is an electric street railway an ordinary use of the streets? There can be no substantial distinction between an ordinary and a strictly legitimate use of the street. With rare unanimity the courts have concurred in holding that an electric street railway operated by means of an overhead trolley wire supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee, but a legitimate use of the streets within the original general purpose of their dedication. *Taggart v. Newport Street R. Co.*, 2 Am. R. R. & Corp. Rep. (R. I.) 44; *Halsey v. Rapid Transit R. Co.*, 47 N. J. Eq. 380; *Railway Co. v. Winslow*, 3 Ohio Cir. Ct. Rep. 425; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Cincinnati Inclined R. Co. v. City & Suburban Tel. Assn.*, 12 L. R. A. (Ohio) 534; *Lockhart v. Craig St. R. Co.*, 139 Penn. St. 419; 6 Am. R. R. & Corp. Rep. 335. Streets were designed to afford facilities for the inter-communication of the multitudes of the people assembled within cities and towns. New and improved methods of travel devised to meet the growing demands of increased population and suburban life are within the original general purpose for which streets were created. Electric street railways, constructed and operated as stated, are but a modern and improved use of the streets as public ways, affording, without considerable public inconvenience or obstruction of other proper use of the streets, the facilities for cheap, rapid, cleanly and convenient transportation so essential to the population of large cities and their suburban additions. The growth and extension of cities must have been contemplated when the streets were established. Such use of the streets, whether new or old, as would best accommodate the increased population, must have been likewise contemplated. The objections urged against the electric railway would exclude the horse car and the cable car. And the result would be to magnify the abutters' insignificant interest in the fee into an importance and value never contemplated by either party, and to subject the public to the burden and inconvenience of making new condemnations of the fee upon the introduction of any new and improved method of using the streets. We hold the electric street railway a legitimate use of the streets within the original general purpose of dedication, and, therefore, an ordinary use.

This seems to have been the common understanding hitherto of the legislature, the street railway companies, the general public and the legal profession. We do not hold, and must not be understood as holding, that the electric railway companies may, without making compensation, accompany such ordinary use of the streets with such extraordinary incidents as impose new or additional burdens upon properties outside the streets that were not and could not have been contemplated and compensated for in the original taking. The difference between a dummy line and an electric street railway are so palpable as to require no enumeration. Judges WILKES and BRIGHT do not concur in the conclusion that electric street railways are an ordinary use of the streets.

By whose negligence or fault has plaintiff sustained the loss under consideration? Clearly upon the facts as found by the majority, the loss caused by conflict of poles and wires is imputable to defendant's fault or want of care. Having power to have avoided this conflict without injury to its plant, it was the defendant's duty to do so. The conflict was the result of defendant's unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create. The objection that induction is not an obstruction of the streets "sticks in the bark." True, it did not arrest the construction and operation of defendant's plant, but that results, not for the reason that induction is not an obstruction, but because defendant was sufficiently powerful to disregard and override it. A child upon defendant's track, in front of its moving car, is not in a strict sense an obstruction; but who will say that the fact does not seriously interfere with defendant's free and unembarrassed use of the street? The constraint caused by liability for legal penalties, if the child is crushed, operates as a very substantial obstruction. Defendant must stop the car or incur serious liability. It is in vain to say that induction is not an obstruction if defendant shall be held for the unavoidable damage caused by it. It is true, induction implies no physical contact of the two plants, but it is a direct and imme-

ate result of plaintiff's use and occupation of the streets. The presence of plaintiff's poles and wires upon the streets cause induction, and their removal would obviate it. The plaintiff cannot recover for the loss sustained from induction. It results from its unlawful obstruction of defendant's use of the streets. The consideration of other questions is irrelevant in this connection.

Second. Is defendant liable for loss sustained by plaintiff from the effects of conduction? The loss by conduction, unlike that caused by induction, does not result from plaintiff's obstruction of defendant's use of the streets for an ordinary purpose. This interference would occur and cause precisely the same loss to plaintiff, and in precisely the same manner, if plaintiff had no poles or wires upon the streets. Loss by conduction does not result in the slightest degree from the presence of plaintiff's poles and wires upon the street, and would not be to any extent remedied by their removal. The contact between the two plants, caused by conduction and the consequent injury, does not occur upon or within the streets or through the medium of plaintiff's poles and wires located upon the streets, but upon plaintiff's private property and that of its subscribers, lying outside of the streets and within half a mile on either side. The fact of plaintiff's occupation and use of the streets, a controlling factor in determining defendant's liability for loss by induction, is irrelevant in the consideration of the question of defendant's liability for loss by conduction. This question must be determined as if the plaintiff had no poles or wires upon the streets. The proviso in the statute of 1885, forbidding plaintiff by its use of the streets to obstruct their ordinary use, has no application to the question under consideration. That statute limits plaintiff's use of the streets, but it does not abridge its right to private property outside the streets and wholly detached from their use. That statute confers upon plaintiff the use of the streets and limits that use. It does not confer upon plaintiff any rights of private property outside the streets, and does not undertake to abridge any such rights. The proviso pertains wholly and exclusively to the use of the streets. The defendant's claim to the dominant use of the streets, if conceded, has no place in the consideration of this question involving the rights of the parties outside the streets.

Another contention of a kindred nature, made on behalf of

defendant, may be conveniently disposed of in this connection. It is insisted that plaintiff's corporate franchise was revoked or modified as an effect of the legislation permitting street railway companies to use electricity in the propulsion of their cars, at least so far as to render it subordinate to defendant's junior franchise. To state it in another form, the insistence is that the act of 1885, for the benefit of telephone companies, has been repealed or modified by implication by the acts of 1887 and 1889, for the benefit of electric street railway companies. Repeals of statutes by implication are not favored. Repugnancy between statutes must be plain and unavoidable, or a later statute will not operate to repeal an earlier one by implication. Again, no intention on the part of the legislature to abridge the granted rights of one corporation by a new grant to another will be recognized by the courts, unless such intention plainly appears in the law. And especially should this rule prevail when both corporations are, as in this case, useful public servants, equally indispensable to public convenience, and the one enjoying the older grant has acquired property and expended money upon the faith of it, which would be destroyed by the revocation of its franchise. It may be conceded that under our Constitution of 1870, corporate franchises are revocable at the will of the legislature. The legislature has undoubted power to exclude a foreign corporation from the state. In neither instance would the corporation have just cause to complain. But this power does not extend to the confiscation of the property of the corporation thus denied the exercise of its franchise. But, in the case under consideration, the plaintiff's rights and franchise have not been abridged or revoked by any subsequent legislation in favor of street railway companies. Had a result so extraordinary been intended as the revocation without compensation of the telephone franchise for the benefit of street railways, it would have found expression by positive enactment. It cannot be admitted by implication upon this record. There is no necessary conflict between the rights and franchises of these companies. There is not any unavoidable repugnancy between the statutes upon which they rely respectively. The electric railway plants can be operated under proper limitations as to distance and apparatus without causing injury to telephone plants by conduction. This fulfills defendant's grant without trenching

upon the pre-existing rights of plaintiff. If defendant seeks to have a more beneficial use of its plant by an invasion or use of plaintiff's property, it is just that compensation be made. Our conclusion is that plaintiff's rights have not been abridged or revoked by the acts of 1887 and 1889, but remain precisely as they were before the passage of these statutes.

It should be observed in this connection that the injury caused by conduction is not such necessary incident to the ordinary use of the streets as to have been contemplated and compensated for in the original taking for street uses. It is not necessarily, or even ordinarily, inflicted upon abutters, but extends to many properties on either side that have not been taken or subjected to any burden for street uses.

This brings us to the consideration of a novel and very important question. It is insisted by defendant that plaintiff cannot recover the damages caused by conduction except upon the theory that it has the right to the exclusive use of the whole earth for electric purposes. A monopoly of the earth's use for any purpose, or by any person, is, of course, inadmissible. The plaintiff, however, repudiates this ambitious and extravagant claim, and insists that its demand is the more modest and reasonable one for the exclusive use of electricity upon its own premises, in an authorized and harmless manner, without injurious disturbance from nonnatural electric conditions caused by the defendant's acts. To recall the pertinent facts: The plaintiff had, by public authority and permission, erected and equipped its telephone plant upon an approved plan, and put it into successful operation, grounding its wires upon the property of itself and subscribers, and using the earth as a "return circuit" in accordance with a universal practice of half a century in like enterprises. Afterwards, defendant by like permission, began the operation of a single trolley electric railway plant, using the earth as its "return circuit." The defendant's plant was placed in such proximity to plaintiff's pre-existing plant as to cause injury to the latter by conduction. The operation of plaintiff's plant caused no injurious disturbances of natural electric conditions anywhere. In the operation of defendant's plant large and turbulent artificial currents of the electrical fluid were generated and poured into the streets beyond defendant's control. These currents, following a natural law, left

the streets and overflowed private property for half a mile on either side. It was upon the private property of plaintiff and its subscribers, and not elsewhere, that these abnormal electric currents found and ascended plaintiff's ground wires and throttled its plant. The injury by conduction can be obviated at an expense which entails no great hardship upon either party. We think, upon these facts, that plaintiff has the right to protection of the courts in the enjoyment of its property. Franchises, easements and the ability to use property, though intangible, have value, and are equally with tangible property entitled to the recognition and protection of the courts. If plaintiff's claim that it contemplates no more than a lawful and harmless use of its own property shall be characterized as a demand for the monopoly of the whole earth, what shall be said of defendant's larger demand for a hurtful use not only of the streets but of private property for half a mile on either side? The plaintiff's request is: "Let me alone in that use or application of electricity upon my own premises that causes no harm or disturbance to any one anywhere." The defendant's command is: "Get out of my way" to all feebler electrical enterprises that may have the misfortune to come within the range of its power. The plaintiff proposes an adjustment of conflicting claims with the defendant by the rule embodied in the enlightened maxim, *sic utere*, etc., while the defendant insists upon the application of that ruder maxim, "Might makes right." If defendant could succeed in its contention, there can be little doubt that the unjust rule thus established would some day "return to plague the inventor." What protection has this defendant in the enjoyment of its vast properties if it can be deprived of the power to operate them by some younger but more robust child of invention that shall hereafter obtain mastery in the electric world? Is not the non-injurious use of electricity the only safe and just basis for the adjustment of the conflicting claims of electrical inventions and enterprises? What different basis than this can be arbitrarily established? Where shall the line be drawn between these electrical enterprises that must take care of the artificial currents of electricity generated by them and those that shall not be required to do so? To concede defendant's claim is to give to it an injurious use of plaintiff's property, and at the same time to deny

plaintiff the harmless use of its own. The argument that assumes that plaintiff is claiming the whole earth as a return circuit, and, therefore, appropriating a common right to its exclusive use because "plaintiff's portion of the earth cannot be isolated and separated electrically from the balance of the earth," is one which, if pressed to its logical results, would work a revolution in the law as to the use of the earth, the water and the air. How, if this argument be sound, can any one insist that the air and water, that by the operation of natural law visit his premises and support life, shall not be rendered noisome and impure by the injurious acts of his neighbors? It is impossible that this portion of the air or water can, in advance, be "isolated and separated from the balance." Is not the right to the use of air and water as "common" as that to use electricity? If the right to the harmless use upon one's own premises, without injurious disturbance from others, of air or water or electricity is made to depend upon his ability to isolate and separate in advance his portion of these elements from the balance, that right resolves itself into an "airy nothing." The suggestion that plaintiff, in using the earth as its "return circuit," appropriates and uses electrically the properties intervening between its "exchange" and its subscribers' stations in any other than a rightful manner is, as we think, based upon a misconception. The plaintiff's use of electricity causes no disturbance electrically upon these intervening properties or elsewhere, and affords no inducing cause there or elsewhere for the invasion of its property by defendant's artificial electrical currents. The plaintiff uses the intervening or other outside properties for electrical purposes in no other sense than it uses abutting lands as part of the framework of the earth to support its own, or uses the channel of the stream upon adjoining lands that conveys the water by natural flow to its own, or uses the law of gravitation that causes the water to flow towards its land instead of in an opposite direction. The plaintiff does not assert the right to an injurious use of electricity, even upon its own premises. The doctrine that reason sanctions and justice approves, as it appears to us, is that the lawful, harmless and accustomed use upon one's land, alike of water, air or electricity, cannot be lawfully obstructed or impaired by the injurious act of

another, attended with such disturbance of natural and existing conditions and consequent loss, as that caused by conduction in this case, especially when the party performing the injurious act had the power to obviate and remedy the injury or loss, without greater sacrifice, comparatively, than is required of defendant in this case to remedy conduction. It is not material that the injurious act is done upon the premises of one other than the injured party, as if the channel of a stream is cut upon adjoining lands and the water diverted, or the waters on them arrested in their regular flow and then turned loose in flooding quantities.

To sustain plaintiff's claim accords with the analogies of the law, as will appear from the following cases: A manufacturer of cocoa matting used a delicate chemical to bleach his matting, which was then hung out on his own land in the air to dry. Another manufacturer made sulphate of ammonia, and the vapors escaping in the air combined with the bleacher's chemicals and blacked his mats. It was shown that if the cocoa-mat maker had used another chemical, just as good or better, his mats would not have been affected. But it was held that he had the right to use any chemical he pleased, which would not hurt anybody else, and that he had the right to have the air come to his lands pure and untainted. *Cooke v. Forbes*, L. R., 5 Eq. Cas. 166. A manufacturer discharged the refuse from his works into a surface stream. It corroded the boilers of another factory below, which used water from the stream for steam purposes. The upper manufacturer was enjoined. *Merrifield v. Lombard*, 13 Allen, 16; S. C., 90 Am. Dec. 172. A manufactory of copper in one case and of lead in another, gave off vapors which were carried by the winds upon the lands of another and injured growing crops, fruit trees and flowers. They had to close down. *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; App. of Penn. Lead Co., 96 Penn. St. 116; S. C., 42 Am. Rep. 534. A brewer bored a deep well and got water for use in making his ale. There was no running stream below. His neighbor had a similar well, but used it as a sink. The sewerage percolated the brewer's lands, and polluted the water so it could not be used in making ale. The brewer was protected in the use of his well. *Ballard v. Tomlinson*, L. R., 29 Ch. Div. 115; S. C., 24 Am. Law Reg. 634. The Standard Oil Company stored oil in its warehouse.

The oil barrels leaked. This leakage soaking into the earth percolated Mr. Kinnaird's land and ruined his spring. It was held the company had no right to thus use its property. *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; S. C., 25 Am. St. Rep. 545. A silk maker required water of great softness and purity to wash and dye his silks. He got it out of the "Charnot." A public water company built a reservoir above, and so collected the water that when it was discharged the purity of the water was affected. The company had to quit. *Clowes v. Staffordshire, etc., Co., L. R.*, 8 Ch. App. Cas. 126; Gould on Waters, § 219; *Acquaenock Water Co. v. Watson*, 29 N. J. Eq. 372.

Although the precise question determined in this case has not hitherto been necessarily involved in the decision of any case, it has, nevertheless, been considered by some of the courts. In *Hudson River Tel. Co. v. Watervliet T. & R. R. Co.*, 32 N. E. Rep. 148, decided in 1892, the Court of Appeals of the state of New York expressed its views as follows: "The defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act, unaffected by any interferences on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage. We are not prepared to hold that a person, even in the prosecution of a lawful trade, or business, upon its own land, can gather there by artificial means, a natural element like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force, and to such an extent, as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided because the actor is aided

in the accomplishment of the result by a natural law. It is not the operation of the law to which plaintiff objects, but the projection upon its premises by unnatural and artificial causes of an electric current in such a manner, and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property; and shield himself from liability by the plea that it was not his act, but an inexorable law of nature that caused the damage. Except where the franchise is to be exercised for the benefit of the public, the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form; but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects for pleasure or profit the subtle and imperceptible electric fluid there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water power — that of providing artificial conduit for the artificial product, if necessary to prevent injury to others." The opinion of the Supreme Court of New York was to the same effect. An English judge, in a recent case, has thus stated his views: "But, after reflecting much on the merits of the case, on the argument addressed to me, and on the peculiarity of an electric current, as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damages which that current does to his neighbor as he would have been if instead he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it finds its way onto his neighbor's land, and there damages the neigh-

bor, the latter has a cause of action." Nat. Tel. Co. v. Baker, (1893) 2 Ch. 201. The same doctrine is maintained by Judge TAFT, then judge of the Superior Court of Cincinnati, and now a justice of the Federal Circuit Court of Appeals, in the case of the City & Suburban Tel. Assn. v. The Cincinnati Inclined Plane Ry. Co. The injury by conduction constitutes such invasion or taking of plaintiff's property as renders the defendant liable for the damage done. It is a direct and immediate result of defendant's injurious act. It imposes a burden upon plaintiff's property that impairs its use and value. The loss is fixed and definite in amount. It can make no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid. The important consideration is that a thing of value has been taken from plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of justice that the public, not the individual citizen, should bear the burdens imposed upon private property for the public benefit. That defendant's act may have been authorized and lawful can make no difference. The legislature has not the power (except, perhaps, as to corporate franchises) to authorize, and in this case it has not undertaken to authorize, the taking of private property for the public use without compensation. Says Mr. Taylor on Corporations: "To constitute a taking of property it is not necessary that any *material* thing be actually taken; it is enough if any *right* of the owner respecting the thing owned be impaired, so that he cannot apply the thing to all the uses of which it was formerly capable. The legislature cannot authorize either a direct or a consequential taking or *injury* to property without compensation; and if a corporation voluntarily, for its own benefit, so constructs a work as necessarily to injure the property (i. e., the thing owned) of an individual, or deprive him of any right he may possess regarding the thing which he owns, or his rights therein, it will be bound to compensate him for his damages, even though the work be properly and lawfully constructed." Taylor on Corp. §§ 173, 473, and numerous cases cited. Mr. Lewis, in his late exhaustive work on Eminent Domain, sums up the doctrine in these words: "What possible distinction can there be between the

actual taking of my property, or a part of it, and occupying it for the erection of a railroad track, or a gas house, and *invading* it by an *agency* that *operates* as an actual abridgment of its beneficial use, and possibly a complete and practical ouster?" § 152. "An act which authorizes a particular business at a particular place, which necessarily defiled the air, so as to create a nuisance, would be void, unless it was for the public use, and, if for public use, such as manufacturing gas for a city, would be subject to the constitutional limitation of making compensation." Lewis on Em. Dom. § 152; see *Ib.* §§ 55, 57, 149. Says Mr. Wood in his work on Nuisances: "Wherever the exercise of the right (asserted) operates to destroy an *easement* incident to real property, or *amounts* to an actual physical invasion of the property by some *agency* that produces injury thereto, or imposes a *burden* thereon — this is taking of property." § 762. And further: "The legislature cannot confer upon a corporation the right to do any act that imposes a burden upon the property of others that amounts to an actual taking of property for public purposes, so as to exempt such corporation from liability for all damages that may result from the exercise of their franchise, that, in law, amounts to a taking of property." Wood Nuis. § 759. See, also, *Gray v. Knoxville*, 85 Tenn. 99; *Street Ry. Co. v. Doyle*, 88 Tenn. 747; *Myers v. St. Louis*, 82 Mo. 378; *Abendroth v. Manhattan Ry.*, 122 N. Y. 1; 19 Am. St. Rep. 461.

The injury by conduction does not belong to that class of "consequential injuries" or "inconveniences" which, it is said, must be borne in ordinary cases without compensation, as the penalty and price of living in cities and enjoying the conveniences and comforts of civilized life. These are usually of such character as to affect the community generally, and are, therefore, in a sense, borne by the public. The damages thereby inflicted are, moreover, not of easy and satisfactory computation. Here the injury is the direct result of an injurious act, and of a graver character than a mere inconvenience. It affects a single person seriously, and the community only incidentally. The loss inflicted is definite in amount. We respectfully dissent from the view expressed by Judge Brown, in the injunction case between these companies, where he classes this injury with the inconveniences that result from the "smoke that fills our lungs

and soils our garments, the dust that enters our dwellings and stores and damages our furniture, the noxious odors that assault our nostrils, the impure water we are sometimes compelled to drink," which, he says, "are the necessary penalties we pay for living in cities, but in ordinary cases there is no legal remedy for the evil." *Cumberland Tel. & Tel. Co. v. United Electric R. Co.*, 42 Fed. Rep. 273. This is not, in our opinion, an ordinary case, in which compensation should be denied, even if it is classed as an "inconvenience" or "consequential injury."

It has been suggested that the electric railway companies may be subjected to multiplicity of suits under this decision, that may be inconvenient and expensive for the railway companies; but it constitutes no defense to their liability for the value of private property taken for their use. Besides, the inconvenience is not all on one side. It might prove equally inconvenient for the citizen to have his right to maintain a telephone at his house or place of business placed at the mercy of the electric railway companies.

One question remains: Was it plaintiff's legal duty, upon the institution of defendant's electric system, to protect itself against the injurious consequences, by making, at its own ultimate cost, such changes in its pre-existing plant as would obviate the effects of conduction, e. g., by putting in the "McLeuer device?" We answer this question in the negative. The defendant must take care of the reasonable and natural consequences of its own acts. The plaintiff, being in the lawful possession and enjoyment of its own property, was under no obligation to take notice of defendant's approach or to get out of its path. Judge Brown says in his opinion in the injunction case: "If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience, or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction." This is correct as regards the application for an injunction, but if it is to be understood as holding that defendant would not be liable for the loss by conduction, if plaintiff could apply the cheaper remedy, then we dissent from the view expressed. The plaintiff can only recover such loss as necessarily resulted to it from defendant's act. It must use due diligence to prevent unnecessary loss. The fact

that plaintiff could apply the cheaper remedy would affect the amount of its recovery, but not the fact of defendant's liability. The right of the owner for compensation for his property, taken for public use, does not depend upon any consideration of this sort.

We have been referred to some cases that maintain views in apparent conflict with those expressed herein. It is sufficient to say of these cases that the New York and Ohio cases were decided chiefly upon consideration of particular statutes. *Ry. Co. v. Tel. Assn.*, 48 Ohio St. 390. They were, without exception, injunction cases, in which the telephone companies appeared at great disadvantage, as seeking to obstruct the path of progress, and to debar the public of a great convenience. In that contest the telephone companies sought to take the lives of the electric railway companies. Here the question is one of liability for a sum that would impose no serious hardship upon either party to bear. In none of the cases was the question here decided necessarily involved. It was discussed, however, by some of the courts. It was perfectly clear in the injunction cases that the telephone companies were not threatened with irreparable injury. They had an adequate remedy by suit at law for damages. On the other hand, to have enjoined the railway companies would have inflicted irreparable injury upon them and the public.

As the result upon the whole case, the judgment below is affirmed as to the loss by induction, and reversed in all other respects. And upon the written stipulation of the parties that final judgment shall be entered here, there will be entered in this court judgment in favor of plaintiff and against the defendant for \$3,660.58 for loss by conduction, and \$816 for loss by conflict of poles and wires, with interest from date expended, and all costs of this cause.

Judge CALDWELL concurs in the result of this opinion on the question of conflict of poles and wires, and on the question of induction, but does not agree on the question of conduction.

WILKES, J. (dissenting). I concur in the opinion of the majority as to the liability of the electric railway company for damages for the interference of the poles and wires of the railroad company with those of the telephone company on Main street,

East Nashville, upon the ground upon which it is placed by the majority; I also concur with the majority as to the liability of the railroad company for all damages caused by conduction, and think the conclusion can properly be arrived at upon the grounds taken by the majority; but I am unable to concur with the majority that the use of the streets by an electric railway company is an ordinary use of the streets in the sense of the statute and charter provisions. The use of a street, in its broad sense, is the purpose or object of the street. This is simply to furnish a highway or passageway from one portion of the city to another, and from one man's premises to another. But this highway may be used for this purpose in many different modes. It may be used by foot passengers, by horses, by carriages, by wagons or by street cars drawn by animal power. These are all ordinary or common uses, and have been from time immemorial. What is then the ordinary or legitimate use of the street? We should say, in the words of Mr. Lewis in 6 Am. R. R. & Corp. Rep. 326: "First. The right of passage, the right of each member of the community to use the street for travel on foot, with animals, or in vehicles drawn by animals, including the right to such new modes of conveyance as are adapted to the ordinary surface of the highway, and are free to be employed by any member of the community. Second. The right to improve the street for the purpose of facilitating the right of passage, as by grading, paving, draining, lighting, etc. Third. The right, sanctioned by long usage and acquiescence and by frequent judicial recognition, to lay sewers, gas pipes and water pipes beneath the surface, for use not only in connection with the right of passage, but also in connection with the abutting property. Fourth. The right, possibly, to use the space beneath the surface to a limited extent for pipes or other appliances to distribute any article of convenience or necessity to the occupiers of abutting property, such as steam, petroleum, hot water, electricity and the like. Fifth. The right, upheld by very numerous decisions, of laying down a street railroad so as to correspond with the surface of the street, and to be operated by animal power. Beyond this the authorities do not compel us to go, and reason and justice forbid."

It has been uniformly held, and it is conceded, that an ordinary horse railway is an ordinary use of the streets. It is virtually the

same as a carriage or omnibus line, except the simple fact that the street car is confined to a single track, while other vehicles may pass at will over other parts of the street between the pavements. 2 Dillon Mun. Corp. 722; 2 Am. R. R. & Corp. Rep. 55, note. This court has held that a dummy line is a new use and an additional servitude. Street Railway Co. v. Doyle, 4 Pick. 751. It has likewise been held that a cable car line is an additional servitude. People v. Third Avenue Railway Co., 112 N. Y. 396. That an elevated railway is a new use has also been held and is generally conceded. Thus the law stands as to the several improvements upon the ordinary street railroad. Now, at the time the electric car system was inaugurated, "an electric street car was neither usual nor common. It was not even lawful. Not until several years after the telephone was in operation was it lawful to use such power to propel street railways. A network of wires, double rows of poles, cross wires and long wires charged with dangerous currents of electricity, constant and dazzling flashes beneath the wheels; cars running swiftly, without any visible means of propulsion (the most alarming form of locomotion to horses), and flashing fire all the while; noisy machinery, and all unknown to former ages, and not allowable by special statute only, can hardly be called the usual and common or 'ordinary' use of a public street." I think the practicable test to determine whether the use is a new or an ordinary use, is the character and kind of motive power used. There are valid and permanent distinctions between different sorts of traffic, between a railroad which conforms to the surface of a street and one which does not, between a railroad with a superstructure and one without a superstructure, between a railroad operated by animal power and one operated by other power. The march of invention cannot obliterate these distinctions, nor can improvements and variations in railroad construction and operation. All of these distinctions can be applied to the horse railroad, and it is capable of a logical and permanent distinction from all other railroads. The one particular which distinguishes it from all other railroads is the motive power. Other railroads may be operated on the same sort of tracks; other railroads may be operated without a superstructure, or may be confined to street passenger traffic, but animal power is animal power for all time,

and no other form of power can be confounded with it. In all the early horse railroad decisions, the identity of the motive power with that applied to ordinary vehicles was especially relied upon. The moment this basis of distinction is set aside, that moment the whole subject is thrown into inextricable confusion. If the steam motor is allowed, then there is no resting place between the smallest motor and the largest locomotive.

While I think the reason of the rule is that the electric car line is a new use and additional servitude, I do not consider that the question is settled to the contrary by the authorities. I recognize the number of authorities cited by the majority opinion. Only two of them are decisions of courts of last resort (Cincinnati Inclined Road v. Telephone Association, 12 L. R. A. 534; Hudson River Tel. Co. v. Watervliet Tel. & R. R. Co., 32 N. E. Rep. 148), and these were upon statutes and charters different from ours and having peculiar provisions. Moreover, all the cases were applications in equity for an injunction by the telephone company, in which it was necessary to show not only that the telephones were wrongfully interfered with and injured, but also that the remedy at law was inadequate, and the injury not susceptible of being righted by an action at law for damages. The action being brought by the telephone companies, the result was that in most cases the injunctions were refused. But the text writers agree that the question, as between the telephone and railways, is still open and unsettled, and they incline to the view that the electric car system is a new use and additional servitude. Keasbey Elect. Wires, 153; Thomp. Elect. 64; Booth St. Ry. Law, § 135; 6 Am. R. R. & Corp. Rep. 336; 2 Dillon Mun. Corp. (2d ed.) 892; 2 Am. R. R. & Corp. Rep. 57. In this case, for the first time, the naked question of law is presented, untrammelled by the considerations which applications for injunctions in advance involve. The present case is one at law, to recover damages which have been sustained, and the cases cited and relied on by the majority are not conclusive. Holding to this view, I am of opinion the electric company is liable for all damages caused to the telephone plant, and the judgment of the court below should be reversed, and judgment given here for the several amounts claimed.

I concur in this opinion. BRIGHT, Sp. J.

SNODGRASS, J. (dissenting). I cannot agree with the majority of the court as to liability of defendant for injury by conflict of poles on the streets, and my disagreement is based upon the ground that defendant's use of the street, being the dominant use for a proper street purpose, and the city having in fact authorized and directed the erection of the electric railway poles where placed, the telephone company, whose occupation of the street, while a lawful and permissive one, was nevertheless not a street use proper, cannot complain because the poles of the electric railway company were placed on one side of the street when, in fact, they might have been placed on the other. The telephone company can no more complain of this than could any other property holder on that side of the street complain because poles were not located on the other. If so, when such poles are placed in front of buildings constructed on one side of the street, opposite which there are none, the owners of the building may then rightfully complain that the poles should have been placed on the other side, and in front of the vacant property, a clearly inadmissible claim.

It being clear that the telephone company is on the streets merely by permission, and that their occupancy is subordinate to any street use to which the city might wish to devote the streets, when the city has undertaken to use them for electric railway purposes it cannot be hindered in doing so, nor can the telephone company claim damages for such use authorized and directed by the city. The concession or determination that the electric railway use is a proper street use is conclusive of that question, and neither the city nor the company can be made by the telephone company to select one side rather than another of the street for placing the poles, or pay damages if it does not do so. On this theory alone, too, is based the other conclusion of the majority that the defendant is not liable for damages caused by induction. If not liable for one it is not for the other. Properly considered, the two conclusions are necessarily in conflict.

It will not do to say the city can let the electric railway company run its wires parallel with the wires of the telephone company on the streets so as to destroy the use of the latter wires and not be liable, and cannot let it erect street railway poles and wires in contact with them without being liable. The right to permit the erection of poles includes the right to permit it any-

where the poles can be properly erected, at the discretion of the city. It cannot be made, directly or indirectly, by imposition of penalty in damages on its grantee, to choose a particular side of the street. The railway use being a street use, the telephone company's rights, granted in subserviency thereto, must yield to the claim of the city and its grantee for street service. In this connection it must not be forgotten that though, under the act of 1385, it was permitted to telephone companies to construct their lines along and over the public highways and streets, it was not intended thereby to recognize such use as a proper roadway or street use, for it was in the same act provided that this permission was granted upon the condition that the *ordinary* use of such public highways, streets, etc., be not thereby obstructed. It is, of course, too clear for argument that it is not a *necessity* for the operation of a telephone line, that it be erected in the streets. It is a convenience to it, of course, and the permission it obtained through legislation was a very desirable one, but it did not obtain it upon any theory that it was a street use, nor can any such claim be made for it. With or without the act, therefore, it is a subordinate use, permissive only for convenience, and must yield to any claim of the public for legitimate street uses, of which the electric railway is one.

On the main point in controversy — the right of damages for injuries inflicted by conduction — I also disagree with the majority. The majority opinion is founded, and can be founded, alone on the idea that the complainant has the natural right to the use of the earth as a return circuit, for the complainant does not profess to own the intervening earth between points where its wires on the premises of its several subscribers are buried and its plant. It is only in consequence of this use of the earth, and its natural right to use it, that the telephone company's intersecting locations at various places are of value. Disconnect these from the right to use the adjacent earth owned by others than itself, intervening between these points and its "exchange," and it has no valuable property in its buried wires on the premises of subscribers. So that, in order to deny the defendant the right to use the earth for a return circuit, this very right must be conceded to complainant. And it must logically be conceded that, having first taken possession, it has acquired a monopoly of the earth.

The position destroys itself, for it must, to be true, assume the existence of a right in one which has to be taken for granted in order to disprove that the same right exists in another. It is no answer to this to say that complainant has a natural current, not disturbing electrical conditions, or a harmless current. It is not a natural current, but an artificial one, depending for its existence on the generation and specific direction of increased electric fluid, and along an artificial channel. It is not harmless any more than the other, except that it is not powerful enough to overcome or practically interfere with the other, and in the sense that, in this contact, it produces no obviously injurious results. But it is unnatural, and the hurtful or harmless character, as compared to the other, is different in degree merely, and not in kind, as both are alike artificial and powerful.

No scientist has yet been able to show how or where the injurious contact first occurs. Whether it originates on the land where the wires are buried, or elsewhere on the circuit, and pursues its entire round, is a matter of speculation merely. The hurtful overflow or disturbance may, in fact, originate at a point entirely away from the telephone wire's intersection with the earth, and on land which the telephone company does not claim; but, assuming the contact and disturbance to commence there, then it could not work an injury, unless, in connection with that particular land, the complainant had undertaken to use the earth away from it as a circuit; and so the injury is not to the specific property, but to the circuit of the earth thus sought to be appropriated and monopolized.

Complainant's use of the earth as a return circuit was, of course, on the theory we are treating it, a rightful appropriation by complainant, because that of a property of the earth for such as is common to all. But it cannot, for that very reason, be an exclusive or monopolistic appropriation. If a right at all, it can only be a natural, common right, and cannot be asserted against the exercise of a like right which may impair it, because it cannot be exclusive property; for such use of the earth as may be made exclusive by monopolizing can never be recognized as property.

Principles deduced from cases of poisoned air, polluted water, obstructed light, etc., are inapplicable, as drawn from plausible but faulty analogies. These are injuries resulting in specific

places to persons having the right to the free and exclusive enjoyment of so much of these elements as are their own or necessary to their own use. But such rights cannot be enlarged, and these cases made applicable to the case of a claim to use the earth for a special benefit from point of contact of a wire (part of an artificial circuit) on one's own property, to any other remote point through lands not so owned, and through which the claimant could acquire right of way only by natural inheritance, in common with all mankind, or by purchase. If the right exists as a natural right, it must be common, and cannot be exclusive. It is not pretended by complainant that it has been acquired by purchase, and, therefore, it does not, as claimed by complainant, exist at all. That complainant's private property is not affected, independently of its claim to the use of the earth as a circuit, is manifest, for no electric fluid could affect such property in the form of land leased or owned by complainant, unless the circuit—the artificial circuit—was established.

The effect of this holding of the majority is to make the railroad company liable for injury to all property within the influence of its escaping electric current, for it is assumed that the value for telephonic use of all property within the influence of this current is impaired. If this be true, it is immaterial whether such property is now being so used or not. The destruction of its capability for such use would necessarily give the right to damages. It must follow, therefore, upon this theory, that all land within the range of the electric influence of defendant's circuit is impaired in value, though not a foot of it has any such value without connecting it with an artificial circuit. This injury, it appears to me, cannot, in fact, result, but it must be held to result on the theory of the majority. The assumption that complainant has the same right to the use of the electric circuit established over adjacent lands, as it has to the support of adjacent land, use of surrounding air, or of water, distantly flowing and finally passing through its property, is obviously fallacious, because all these are natural elements in natural condition, ultimately naturally brought, without artificial means or special appropriation thereby, for complainant's use, but complainant's claim to a special artificial use of the earth throughout that portion claimed by it, as well as by others, if it is a special artificial use, is not helped by reference

to natural conditions, under which his right to the enjoyment of natural elements is conceded. For, if treated as a natural right, complainant's claim to the earth as a circuit cannot exist to the exclusion or hindrance of an equal natural right in another. The proposition is clear that if it is an artificial right, complainant would have to show his claim to so much of the earth as he uses for a circuit as an owner, before, in any event, it could be exclusive. This he does not pretend to do, and, on this account, his claim must fail. If asserted as a natural right, it must be because it is common and not exclusive. It must fail as such, because, if sustained at all, it must be sustained as exclusive. Complainant has, therefore, no real claim of ownership or superior common right, and, on this ground, his claim for damages should be denied.

I have discussed the questions involved only upon principle, but my conclusions on both propositions are sustained by authority.

The first proposition is directly adjudged by the courts of last resort in New York and Ohio, and my conclusion as to the second seems to have the approval of the greater number of courts which have considered it, though not altogether in theory.

In the case of the Hudson River Telephone Co. v. Watervliet Turnpike & R. R. Co., 6 Am. R. R. & Corp. Rep. 619, decided by the Court of Appeals in 1892, and reversing the decree of the Supreme Court of New York, cited by the majority, it was held that the telephone company's use of the street, being a subordinate one, it could not complain of injuries inflicted by the overflowing electric current of the railway company, because its right was subordinate to that of the railway company. To the same effect is the case of Cincinnati Inclined Plane Railway Co. v. City & Suburban Telephone Association, 4 Am. R. R. & Corp. Rep. 533, decided by the Supreme Court of Ohio, 1891. It is proper to say, too, that the Supreme Court of Ohio, in this case, which reversed his decree therein below, has not adopted the views of Judge TART, elaborately quoted in the majority opinion in this case; nor do the conclusions of the Supreme Court of Ohio and Court of Appeals of New York, differing from those of Judge TART and the Supreme Court of New York, depend upon statutes or the form of the action, as might be inferred from the majority opinion. It is true that these cases were injunction

cases, as was that also between these same parties in this case, reported in 42 Federal Reporter, 279, cited by the majority, but the questions determined in them adverse to the conclusions of the majority in this case, were not settled, so far as questions we are discussing are concerned, upon construction of statutes, nor dependent upon form of action, and these states, therefore, by decisions of their courts of last resort, have ranged themselves on the other side of the question than that taken by the majority of this court. The weight of authority is against the holding of the majority in this case. I have not, however, attached much importance to the preponderance of decided cases. The question is practically a new one; the cases on it are few, the reasons for each often different from the others, and none absolutely conclusive. I have preferred to rest this dissent upon its own reasoning.*

1. **Damages from electrical interference—controversy between the telephone companies and electric railway companies.**—The principal case is an important contribution to the law of electricity. The powerful currents used in the operation of the electric railway cause serious disturbance and damage to telephone companies whose lines are in proximity thereto, where both use the ground for a return circuit. A number of suits have been brought by the telephone companies to enjoin such interference. The only cases that have been decided by courts of last resort are reported in this series as follows: Cincinnati Inclined Plane R. Co. v. City & Suburban Tel. Assn., (Ohio) 4 Am. R. R. & Corp. Rep. 533 (1891); Hudson River Tel. Co. v. Water-vliet Turnpike & R. Co., (N. Y.) 6 Am. R. R. & Corp. Rep. 619 (1892). In the Ohio case the injunction was denied, though the telephone company was first in possession, on the ground that the electric railway was a legitimate, though a new and improved, street use, and that the grant to the telephone company was subordinate to the use of the street for all legitimate street purposes then existing or thereafter established. This was held as a matter of general law, and not upon the construction of particular statutes. In the New York case the same result was reached, but upon the ground that the grant to the telephone company was made *expressly* subject to the right of the railway company to use electricity in the manner it did.

There have been a number of *nisi prius* decisions upon the same question with varying results. Most of these are unreported. See 2 N. W. Law Rev. 100, 101; Keasby on Electric Wires, 139-153; 42 Fed. Rep. 278. So far as we are aware, only two of such cases have been reported, and in both injunctions were denied, but upon different grounds. Cumberland Tel. & Tel. Co. v. United Electric R. Co., 42 Fed. Rep. 273 (1890); National Telephone Co. v. Baker, (1893) 2 Ch. 186; 62 L. J. Ch. 699 (1893).

* Reported in 29 S. W. Rep. 104.

In the former of these cases, BROWN, J., now of the Supreme Court of the United States, sums up his conclusions as follows: "The substance of all the cases we have met with in the examination of this question — and we have cited but a small fraction of them — is that, when a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. *Hoyt v. Jeffers*, 80 Mich. 181. If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing the defendants or the public to any great inconvenience or large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effective and less objectionable and expensive remedy is open to the complainant, we think the obligation is on the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. We place our denial of an injunction upon the following grounds: 1. That the defendants are making lawful use of a franchise conferred upon them by the state, in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself. 2. That in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant. 3. That the damages occasioned to the complainant are not the direct consequence of the construction of the defendant's roads, but are incidental damages resulting from their operation, and are not recoverable. The cases involving this principle are almost innumerable: and in our examination of them we are satisfied the great weight of authority bears in the direction we have indicated."

In the English case, the suit was by the telephone company for an injunction and damages. The plaintiff operated a telephone system in Leeds, and the defendant was lessee of an electric railway in the same place. The authority to the defendant contained an express condition that nothing should be done under the act to interfere with any telegraph line of the postmaster-general. The court held, per KEKEWICH, J., that, under the rule laid down in *Rylands v. Fletcher*, L. R., 3 H. L. 830, a man who has created or called into existence an electric current for his own purposes, and who discharges it into the earth beyond his control, is responsible for the damage which that current does to his neighbor, but the court found that the acts of the defendant were authorized by act of parliament which contained no provision for compensation and made no saving of the rights of the plaintiff, and held that

the plaintiff was, therefore, without remedy. The court says : " I cannot see my way to holding that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damages which that current does to his neighbor as he would have been if instead he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force, but when once it is established that the particular current is the creation of, or owes its special existence to, the defendant and is discharged by him, I hold that if it finds its way on to a neighbor's land; and there damages the neighbor, the latter has a cause for action. At any rate, I think that, if a distinction is to be taken between this and other forces for this purpose, that distinction must be made by a higher tribunal, and not by a judge of first instance. It was endeavored to be argued on behalf of the defendants that the current injuring the defendants was only part of the general body of electricity which may be now said to exist everywhere, and to be proceeding in every direction; but the effect of the defendant's operations is to collect a particular portion of this body, and to discharge it into the earth at a particular spot, and there can be no doubt but that the disturbance of the plaintiff's telephonic system is caused by the particular quantity thus discharged."

To the point that it was plaintiff's duty to put in a metallic return circuit and thus obviate the disturbance, the court said : " The man who complains of his land being thrown out of cultivation by the incursion of water escaping from his neighbor's reservoir must not be told that he has no right of action because, if he had interposed a wall, or otherwise taken care to protect himself, the water would not have reached his land. He who is using his land in a natural way is not bound to take extraordinary precautions, and is entitled to rely on his neighbor also using his land in a natural way, or, if he uses it otherwise, taking extraordinary precautions to prevent damages to others therefrom. There is no doubt a body of evidence to show that a system different from that adopted by the plaintiff has been adopted elsewhere with advantage, and may possibly prove to be the most convenient, though more expensive, for them, but the evidence also proves that their present system has been largely adopted, and is received with favor by many competent to form an opinion. It also has the merit of economy. They are carrying on their own business lawfully, and in the mode which they deem best, and I cannot oblige them to change their system because they might thereby possibly enable the defendants to conduct their business without the mischievous consequences now ensuing. True it is that the analogy introduced above fails to this extent, that the plaintiffs are using their land for an extraordinary purpose, but admittedly it is a lawful purpose, and though under an obligation to obviate mischief from their own operations to their neighbors, they are under none, in my judgment, to protect themselves from the defendant or others. The outflow from one reservoir might easily destroy another, but, so far as I am aware, there is no principle or authority in English law for rejecting a claim for damage by the owner of the latter on the ground that his user, as well as that of his neighbor, is extraordinary."

To the contention of the plaintiffs that the defendants were not protected by their statutory powers unless they have acted reasonably in the exercise thereof, and have done their best to avoid injury to their neighbors, and that they had not done so, for the reason that it was shown that other systems were in use and practicable which would have greatly mitigated or altogether obviated the injury to the plaintiffs, the court answered: "My conclusion, from the evidence, is that the defendants' system is, on the whole, the best which practical science has yet discovered, but there is no occasion really to go as far as this. It is enough to say, and about this I entertain no doubt, that it is at least as good as any other, and has been proved by experience, especially in the United States, where there have been larger opportunities for experiment and consideration, to be as likely as any other to meet the requirements of traffic and the convenience of all concerned in the protection of the site of tramways for the use of legitimate purposes other than those of the tramway undertaking. It cannot be that, in the application of the law which I am now considering, the court is bound to hold a railway or other company liable for the consequences of acts done under statutory powers because it has not adopted the latest inventions of ever-changing, ever-advancing scientific discovery. It is surely impossible, with any regard to that common sense which, after all, is the foundation of this and many other branches of the law, to say that a railway company which was not liable last year, last month, or even yesterday, because, until then, its undertaking was carried on according to rules acknowledged to be the best, is liable now, not because those rules have been proved to be altogether wrong in practice or unscientific in principle, but because some diligent worker in this department has discovered what is held for the moment to be a large improvement, but may to-morrow turn out to be only a step in the progress of further advance; and yet this might be the necessary conclusion in many cases, and, indeed, might be the necessary conclusion here, if I were driven to support the plaintiff's claim on the ground that the 'single trolley system,' so largely approved where it has been largely tried, does not avail the defendants as a proper exercise of their statutory powers because another system is in use, and apparently in successful use, at Buda-Pesth or elsewhere."

We have quoted at length from this case because it is the only English case upon the subject, and because it discusses in a clear and satisfactory way the question at issue between the companies.

In *State ex rel. Wisconsin Tel. Co. v. Janesville Street R. Co.*, 9 Am. R. R. & Corp. Rep. 819, an electric railway company was compelled by mandamus to comply with an ordinance requiring it to string guard wires over its trolley wires wherever they crossed the wires of the telephone company, but the question of electrical interference by conduction or induction was not involved.

2. Controversies between telephone companies and electric light companies, as to interference of poles and wires and electric currents.—The result of the decisions so far is that where a telephone company has set up its poles and wires in a street under due authority, a light company will be enjoined from subsequently so placing its wires as to interfere with the wires of the former company, or to endanger its employees or impair its service. *Nebraska Telephone Co. v. York Gas & Electric Light Co.*, 27 Neb. 284; 48

N. W. Rep. 126; *Paris Electric Light & R. Co. v. Southwestern Tel. & Tel. Co.*, (Tex. Civ. App.) 27 S. W. Rep. 902.

3. Controversies between different electric light companies as to interference.—Where two electric light companies are authorized to occupy the same streets with their poles and wires, the company which first sets up its poles and wires will be protected by injunction from interference, by the other company so placing its wires as to endanger the employees of the first company or impair the efficiency of its plant. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, (Vt.) 8 Am. R. R. & Corp. Rep. 157; *Consolidated Electric Light Co. v. People's Electric Light & Gas Co.*, 94 Ala. 372; 10 South. Rep. 440. In the last case it is said: "We think applied electricity has been long enough employed, and its uses and dangers sufficiently ascertained, to authorize the statement of certain propositions as falling within the purview of common knowledge. Among them, may we not state the following? (1) Contact with electrical conductors, sufficiently charged to serve the purposes of city illumination, destroys animal life. (2) To properly regulate the apparatus for distributing electric light requires that the employees or servants shall ascend the poles and go among the wires. (3) Two sets of wires, occupying the same space, and charged from different dynamos, located apart, and controlled by separate and independent engineers, could not fail to be dangerous in many ways."

4. Electrical interference generally.—We believe the foregoing sections embrace all the reported cases on the subject of electrical interference. An interesting article by A. M. Belfield on the subject, "Is Electrical Interference Actionable?" will be found in 2 N. W. Law Rev. 99-112. The subject is also discussed in Keasby on Electric Wires, 139-153.

STATE EX REL. BROSS V. CARPENTER ET AL.

(Supreme Court of Ohio, February 27, 1894.)

CORPORATIONS. PROPER REMEDY FOR REFUSAL TO ISSUE STOCK CERTIFICATE TO ONE ENTITLED THERETO. When the proper officers of a private corporation organized for profit refuse to issue a certificate to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or to enforce the issue and delivery of such certificate in equity, either of which he may pursue, at his election. Mandamus is not the proper remedy.

Norway & Fitch and *Tracy Barnum*, for plaintiff in error.
George A. Groot, for defendants in error.

WILLIAMS, J. The original action was mandamus, brought in the Court of Common Pleas of Ashtabula county by the plaintiff in error against the president, secretary and treasurer of the Baker

Engine and Machine Company, a manufacturing corporation organized in this state, to compel them to issue to the relators, Bross and Baker, certificates for 310 shares of the company's stock, of \$100 each, which it is alleged the relators duly subscribed and paid for, and for which the defendants refuse to issue certificates to them. The relators allege, in general terms, that they have no adequate remedy at law, and pray for a peremptory writ. The answer denies that the relators paid for the stock, or paid any sum whatever on their subscription, and avers they are indebted to the company for the full amount thereof, namely, \$31,000. The court found the issues for the defendants, and held, furthermore, that the remedy of the relators at law was adequate, and on both grounds denied the writ. The Circuit Court, to which the cause was taken on appeal, stated its conclusions of fact and of law separately, at the request of the plaintiff. It found that the relators fully paid for the stock, and were entitled to the certificates, but held that their remedy was in equity, and for that reason refused the writ; and it is claimed here that, in so holding, that court committed an error.

The cases are in conflict upon the question whether the remedy by mandamus may be employed to compel the issue or transfer of certificates of stock of a private corporation. The remedy in this state is controlled by statutory regulations, which define the writ, and determine the cases in which it may issue. "Mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Rev. St. § 6741. A limitation upon the remedy is contained in section 6744, which provides that "the writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." The duty of issuing certificates of stock of a private corporation to those entitled to receive them is specially enjoined upon its officers, it is claimed, by the following provision contained in section 3254 of the Revised Statutes, viz.: "Stockholders shall be entitled to receive certificates of their paid-up stock in the company, and the president and secretary of the company shall, on demand, execute and deliver to a stockholder a certificate showing the true amount of the stock held by him in the company." And we think there

can be no doubt that such a corporation is bound, through its proper officers, to issue, to each stock subscriber who has fully paid for his stock, a certificate truly representing his interest in the corporation.

But the question still remains, what is the appropriate remedy for the refusal or failure to do so? If there be a "plain and adequate remedy in the ordinary course of the law," the courts are prohibited by statute from issuing the writ. Shares of stock in a private corporation are personal property; and it has long been settled that an action for damages for their conversion may be maintained upon the refusal, on demand, to issue or transfer certificates to persons entitled to them. True, there has not always been uniformity in the rule applied in determining the measure of the damages in such cases—it being held in some that the value of the stock at the time of the conversion is the measure of the damages that may be recovered; in others, its value at the time of the trial; and, in others still, its highest value at any time between the conversion and trial. The first of the rules above stated is the one which seems generally to prevail, unless there is something in the nature or circumstances of the conversion which enhances the damages. But the damages are not necessarily limited to the market value of the stock. Its actual value may be recovered; and that may be shown by proof of the value of the property and business of the corporation, its good will, and dividend-earning capacity. *Freon v. Carriage Co.*, 42 Ohio St. 38; *Cook Stocks & S.* § 581. Besides, "remedy in the ordinary course of the law" is not confined to those actions which, before the adoption of the Civil Code, were actions at law, but embraces suits in equity as well; and if, for any reason, an action for damages might prove inadequate for the full redress of the relators' injury, we see no reason why they could not obtain that complete measure of relief in equity. It was held by this court in *Railroad Co. v. Fink*, 41 Ohio St. 321, that a suit in equity may be maintained against a corporation to compel it to issue a stock certificate to a subscriber, or his assignee upon tender of the sum subscribed. Indeed, that remedy is well established, and is the one generally pursued in such cases, and also in cases where the transfer of stock on the books of the corporation, or a certificate of such transfer, is sought. *Cook Stocks & S.* §§ 61, 391. In

the last section cited, that author says the remedy by suit in equity is the most complete and most just one for compelling a corporation to register a transfer of stock, and, "is a remedy applicable to almost all cases arising under a refusal of a corporation to allow a registry of transfer. The case will be decided on equitable principles, however, and a transfer will not be decreed if it involves bad faith. The relief usually demanded is in the alternative, being either for a registry of the transfer or damages in lieu thereof." The reasons which conduce to the holding that a suit in equity is the most satisfactory and complete remedy to accomplish the registration of transfers of stock apply equally when the object sought is the issue of certificates originally. Mandamus is not well adapted to the trial of questions of fact or the determination of controversies of a strictly private nature. Its office is rather to command and enforce the performance of those duties in which the public have some concern, and where the right is clear, and does not depend upon a complication of disputed facts which must be settled from the conflicting testimony of witnesses. There is nothing in the facts of the case before us which show that an action for damages, or suit in equity, would not furnish the relators a plain and adequate remedy for the wrong complained of. It is not alleged that the corporation has refused to admit them as members of that body, or denied them the right to vote or be voted for, or to exercise their privileges as stockholders, nor that any of their personal advantages or privileges as such have been interfered with. The writ of mandamus has sometimes been issued to compel the admission of members in corporate bodies when essential to the preservation of personal advantages to which they show themselves to be clearly entitled. The petition alleges, in general terms, that the relators "have no remedy at law;" but that amounts to nothing more than a declaration of the pleader's opinion, and, as an allegation of fact, is without force. Our conclusion is that where the officers of a private corporation organized for profit refuse, upon demand, to issue a certificate of stock to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or in equity to enforce the issue and delivery of the certificate. If, for any reason, the one does not, the other will afford him a plain

and adequate remedy, and he may resort to either at his election. Mandamus cannot, therefore, be properly invoked. Judgment affirmed.*

1. Remedy for refusal to transfer stock or issue certificate to one entitled thereto.—See, generally, 1 Mor. Priv. Corp. §§ 212-220; 2 Beach Priv. Corp. §§ 656, 657. Where a company refuses to transfer stock on its books to a purchaser, and conspires to depreciate the value thereof, mandamus will lie to compel such transfer, under statutes of Oregon, Hill's Code, § 598, providing: "The writ of mandamus may be issued to any inferior court, corporation, board, officer or person to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station" — where there is not a plain and adequate remedy at law. *Slemmons v. Thompson*, 28 Oreg. 215; 31 Pac. Rep. 514.

2. Action for damages for refusal to transfer or register measure of damages.—The transferee of corporate stock can recover only nominal damages from the corporation for refusal to enter the transfer on its books, in the absence of evidence of special damage by such refusal. *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479; 58 N. W. Rep. 68.

3. Same — defenses.—In an action against a corporation to recover damages for its refusal to transfer on its books certain shares of its stock, it is no defense that plaintiff acquired the same from a prior holder by means of an illegal gambling contract when there is no showing that the prior holder ever repudiated the transaction, or made any claim on the company for the stock. *Miller v. Houston City Street R. Co.*, 5 C. C. A. 134; 55 Fed. Rep. 366. It is no defense to such a suit that the certificates of stock are held by plaintiff as collateral security for a debt which is barred by the Statute of Limitations, for stock so held is a pledge, and not a mortgage, and the right to the statutory bar is a privilege purely personal to the debtor. *Ibid.*

STATE EX REL. CHILDS, Attorney-General, v. PARK & NELSON
LUMBER CO.

(Supreme Court of Minnesota, July 23, 1894.)

1. CORPORATIONS. FORFEITURE OF CHARTER FOR FAILURE TO KEEP AN OFFICE AND BOOKS IN THE STATE. Under the provisions of the General Statutes of Minnesota, 1878, chapter 34, section 126, it is incumbent upon a private corporation organized under the laws of this state to have its place of business, and to keep its books therein, to an extent necessary to the fullest jurisdiction and visitorial power of the state and its courts. There must be a

* Reported in 87 N. E. Rep. 261.

substantial compliance with the statute, and if there is not the charter may be vacated, and the corporate existence annulled.

2. When it was found that for three years the defendant corporation had evaded and violated the statute in these respects, its charter was annulled.

H. W. Childs, Attorney-General, for relator. Frank M. Wilson and Clapp & Macartney, for respondent.

COLLINS, J. This is a proceeding by information in the nature of quo warranto, filed by the attorney-general, to annul the respondent's corporate existence, and to have its rights, powers, privileges and franchises adjudged and declared forfeited. Many of the acts referred to in the information, and concerning which testimony was taken, affect stockholders only, and with these we are not now concerned. The sole object of these proceedings is to protect public interests; and, to warrant a forfeiture of respondent's corporate franchise for misuser, it must have been such as to threaten or to work a substantial injury to the public. It is shown by the evidence that, although incorporated under the laws of this state, the respondent's business has been that of manufacturing lumber and making boxes at Brasington, Wis. It bought its supplies and shipped its products there. All business correspondence was had, all collections made, and all bills paid at that point. Prior to the month of March, 1891, an office, in which more or less business was transacted, had been maintained at Red Wing, in this state; but about that time, acting under a motion made and carried at a directors' meeting, the general manager removed that office, with all of its furniture, books, papers, stationery and other articles, to Brasington. The removal was so complete that, for the purpose of holding a stockholders' meeting in June, office room had to be hired. A box in the post office was then rented, but no mail, except a few circulars, has been received at Red Wing, and none deposited. Since December, 1891, respondent claims to have had an office at that place, and to have had a secretary and treasurer there. But of that hereafter. It is claimed that no stockholders' meetings have been held since 1891, but, as we regard the case, this is of no consequence. The person said to have been the secretary and treasurer since December, 1891, is an attorney at law residing and practicing at Red Wing. He has had nothing to do with the

business management of the corporation ; has kept no account or other books, except one, in which is a record of a few business meetings. He has handled none of the respondent's money, and none has been kept in this state, save a small balance, of twenty-three dollars, which has been in one of the Red Wing banks. Of respondent's property, nothing has been in his possession or in its so-called office, except a corporate seal ; a stock certificate book, in which there are two certificates ; two record books, in one of which are recorded the respondent's articles of incorporation and its by-laws ; and a number of loose papers, consisting principally of monthly balances or statements of the corporative business, sent him by a person at Brasington, who seems to be respondent's real secretary and treasurer. While it is claimed, by its counsel, that from these monthly statements or balances the exact condition of its business and financial standing can be readily ascertained, as fully as if all of its account books were produced, we think the Red Wing secretary and treasurer appreciated the situation when, on being asked if these statements or balances would show the financial standing and business condition of respondent at the end of each month, he promptly replied : " Assuming them to be correct, they would."

By General Statutes, 1878, chapter 34, section 126, it is provided that the secretary and treasurer of every corporation organized under the laws of this state shall reside, have their place of business, and keep the books of the corporation within its borders ; and it has been held that, independently of a statute, it is incumbent upon a private corporation to keep its principal place of business, its books and records, and its principal offices, in the state in which it is incorporated, to an extent necessary to the fullest jurisdiction and visitorial power of the state and its courts, and the efficient exercise thereof in all proper cases, and that a forfeiture may be adjudged for a violation of this common-law obligation. *State v. Milwaukee, L. S. & W. Ry. Co.*, 45 Wis. 579. The necessity of a substantial compliance with the provisions of section 126 is evident, and a deliberately planned attempt to evade the obligation cannot be overlooked or tolerated. After our statement of the undisputed facts of this case, words need not be wasted in demonstrating that for the past three years the stockholders and officers of respondent corporation have been

engaged in evading and violating that part of the statute under which the corporation was organized, which requires that the place of business shall be, and the books kept, within this state. This is an abuse and misuser of its corporate rights, powers, privileges, and franchises which justify and demand a forfeiture thereof. Judgment will, therefore, be entered vacating the charter and annulling the existence of respondent corporation.

BUCK, J., absent, sick, took no part.*

1. Forfeiture of charter for failure to maintain an office or keep books in state.—Recent decisions upon this question will be found in *North & South Rolling Stock Co. v. People*, 9 Am. R. R. & Corp. Rep. 1, and note.

2. Forfeiture for nonuser or abandonment of franchises.—A complaint in an action by the People, for the dissolution of a corporation, alleging that defendant, a corporation, whose certificate stated its object to be the buying and selling of milk, had ever since its incorporation (nine years before) failed and neglected to act for the purposes embraced in its charter, and had never bought or sold milk, but that it was fraudulently incorporated in pursuance of an unlawful combination on the part of the milk dealers to control the market price at which it should be bought and sold, and that its sole business had been such unlawful control, states a cause of action for dissolution for nonuser of corporate franchises, the allegations of conspiracy being sufficient to show that, though the corporation was a private one, it was to the public interest that it be dissolved. *People v. Milk Exchange*, 133 N. Y. 565; 80 N. E. Rep. 850.

Where a corporation organized for maintaining an institution of learning, whose property is exempt from taxation to the value of \$25,000, fails for ten years to maintain an institution of learning, sells and removes its buildings, and then attempts to transfer all its land, without showing that any further effort will be made to establish an institution of learning, its charter is subject to forfeiture on quo warranto. *Edgar Collegiate Institute v. People ex rel. Hardy*, 142 Ill. 363; 32 N. E. Rep. 494.

3. Charter cannot be forfeited except upon suit of the state.—A judgment forfeiting the charter of a private corporation, where the state is not a party to the suit, is a nullity. *Pickett v. Abney*, 84 Tex. 645; 19 S. W. Rep. 859.

* Reported in 59 N. W. Rep. 1048.

GLOBE PUB. CO. ET AL. v. STATE BANK OF NEBRASKA
AT CRETE ET AL.

(Supreme Court of Nebraska, June 6, 1894.)

1. CORPORATIONS. STATUTORY LIABILITY WHETHER PENAL. ABATEMENT OF SUIT BY REPEAL OF STATUTE. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit.

2. A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part, and penal in another. The effect, and not the form, of the statute is to be considered; and if its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character.

3. When a law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, such a law is addressed to the stockholders of corporations de jure; and when such statute declares that all the stockholders thereof shall be liable for the debts of the corporation in case it fails to comply with the requirements of the statute, then the law is designed as punishment of the stockholders for a violation of the law, and is penal.

4. ESTOPPEL TO DENY CORPORATE EXISTENCE. CORPORATIONS DE FACTO. Where persons attempt, in good faith, to incorporate themselves into a valid corporation, and such a corporation actually enters upon the discharge of corporate functions, and so continues for a considerable time, unchallenged by the state, persons who contract with such a corporation cannot hold the stockholders thereof liable on such contract because it transpires that, by some mistake or oversight, the corporation had never become a technical de jure corporation.

5. CREDITORS MUST EXHAUST REMEDY AGAINST CORPORATION BEFORE PROCEEDING AGAINST STOCKHOLDERS. The creditors of a de jure corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until execution issued upon such judgment has been returned wholly or in part unsatisfied.

Robt. Ryan, James W. Dawes and Abbott & Abbott, for plaintiffs in error. *Chas. Offut and Charles S. Lobingier*, for defendants in error.

RAGAN, C. The State Bank of Nebraska at Crete, Neb., sued the Globe Publishing Company and the stockholders thereof in the District Court of Saline county to recover the amount of a promissory note owing by said Globe Publishing Company to the said State Bank. Both the bank and the Globe Publishing Company were domestic corporations, having their principal places of business in said Saline county. The bank had a verdict and judg-

ment, and the stockholders of the publishing company bring the case here for review.

The liability of the stockholders of the publishing company for the debt due from it to the bank was based on the failure of the publishing company to publish an annual notice of its existing debts, as provided by section 136, chapter 11, General Statutes of 1873, in force at the time the debt sued for here was contracted. That section is as follows: "Every corporation hereafter created shall give notice annually in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest newspaper in the state, of the amount of all the existing debts of the corporation; which notice shall be signed by the president and a majority of the directors; and, if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such notice is given."

After this suit was brought, but before judgment was rendered therein, the legislature repealed this section 136, without a saving clause. The argument of counsel for plaintiffs in error now is that the repeal of said section abated this action. Whether this is true depends upon the nature of the statute repealed. If it was a statute contractual in its nature; if the right of action acquired by the bank against the stockholders of the publishing company by virtue of said statute, and the corporation's violation thereof, was a vested right, then the repeal of the statute could not and did not take it away. But, if the statute repealed was penal in its nature, then its repeal abated the action.

1. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit. *Bennett v. Hargus*, 1 Neb. 419; *Knox v. Baldwin*, 80 N. Y. 610; *Manufacturing Co. v. Beecher*, 97 N. Y. 651; *Gregory v. Bank*, 3 Colo. 332; *Breitung v. Lindauer*, 37 Mich. 217; *Yeaton v. U. S.*, 5 Cranch, 281; *Norris v. Crooker*, 13 How. 429.

2. Was this a penal statute? This question must be answered by the authorities.

In 1848 the legislature of New York enacted a statute governing manufacturing corporations. Section 12 of that act was as

follows: "Every such company shall annually, within twenty days from the first day of January, make a report which shall be published in some newspaper in the town, city or village, or if there be no newspaper published in said town, city or village then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of the capital and the portion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees and shall be verified by the oath of the president or secretary of such company and filed in the office of the county where the business of the company shall be carried on; and if any such company shall fail so to do all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made." A New York corporation organized under this law failed to give the annual notice of its indebtedness, as provided by said section 12, and during such default became indebted to a bank. The bank then sued the trustees of the corporation for the amount of the debt. The Court of Appeals of New York, in *Bank v. Bliss*, 35 N. Y. 412, discussing said section 12 and another section, said: "The liability of the trustees under said section 12, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but, upon failure to file a report, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted. These provisions appear to be severally punitive, inflicted, on grounds of public policy, for the protection of creditors and the prevention of frauds upon the public in respect to the financial condition of such corporation. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute. There never was any such remedy or cause of action, in whole or in part, at common law. If any action could have been maintained at common law for either of the causes mentioned in sections 12 and 13 of the general act in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained. But

those elements have nothing to do with the actions given by these sections, nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of those sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes place. The right of action is given to the creditors, and they must be held to be the parties aggrieved. For these reasons, I am satisfied that sections 12 and 13 impose a penalty." The question of the nature of this section 12 arose again, and was discussed and decided by the Court of Appeals of New York, in *Miller v. White*, 50 N. Y. 137, and the court said: "It will be observed that this is a highly penal act, extremely rigorous in its provisions." In *Wiles v. Suydam*, 64 N. Y. 173, the statute was again before the New York Court of Appeals. In that case the Imperishable Stone Block Pavement Company, a domestic corporation, became indebted to Wiles et al. Suydam was a stockholder in the corporation, and indebted to it on his stock subscriptions. He was also a trustee of the corporation. The suit was brought by Wiles et al. against Suydam to recover the amount of the debt owing them by the pavement company; and Wiles set out in his petition against Suydam two causes of action, viz., his indebtedness on his stock subscription to the stone pavement company, and the failure of that corporation to publish annually the statement of its existing debts. The court held that the indebtedness of Suydam on his unpaid subscription constituted one cause of action against Suydam, and in discussing the other right of action of Wiles against Suydam, originating by the failure of the corporation to publish its annual statement, said: "The allegations against the defendant as trustee also constitute a distinct and perfect cause of action. Here the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty, in not filing a report showing the situation of the company." The nature of this section 12 has been before the New York Court of Appeals, and the construction placed upon said section, in the leading case (*Bank v. Bliss*, 35 N. Y. 412), reaffirmed in the following cases: *Easterly v. Barber*, 65 N. Y. 252; *Knox v. Baldwin*, 80 N. Y. 610; *Veeder v. Baker*, 83 N. Y. 156; *Pier v. Hanmore*, 86 N. Y. 95; *Stokes v. Stickney*, 96 N. Y. 323; *Manufacturing*

Co. v. Beecher, 97 N. Y. 651. And in Gadsen v. Woodward, 103 N. Y. 242; 8 N. E. Rep. 653, the nature of said section 12 was again before the New York Court of Appeals, and the court said: "This action is brought against the defendant to recover a debt due by a manufacturing corporation, of which he was a trustee, and he is sought to be made liable therefor on the ground that he failed to make the annual report required by the General Manufacturing Law. The action is not to recover a debt which he owes, but to impose upon him, as a penalty for his default, the payment of the debt of the corporation. We have repeatedly held that such an action is for a penalty or forfeiture. The penalty sought to be enforced against the defendant does not arise out of any contract obligation, but is imposed by the statute for disobedience of its requirements." This section 12 of the New York law was construed by the Supreme Court of the United States in Chase v. Curtis, 113 U. S. 542; 5 Sup. Ct. Rep. 554, the court saying of said section 12: "But, as we have already seen, the statute involved in this discussion is not a remedial statute, to be broadly and liberally construed, but is a penal statute, with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability." Section 15 of chapter 18 of the Revised Statutes of 1868 of the state of Colorado is a copy of section 12 of the New York act. The nature of this section 15 of the Colorado act was before the Supreme Court of that state in Gregory v. Bank, 3 Colo. 332, and of that statute that court said: "This statute is, in its nature, penal. It prescribed a determinate penalty for neglect of a duty imposed by law upon the trustees of corporations organized under our General Incorporation Act. The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract, but arises from misconduct in office." This case was reaffirmed by the Supreme Court of Colorado in Larsen v. James, 29 Pac. Rep. 183.

A statute of Michigan required annual reports of certain corporations to be filed, and provided that, if the directors neglected to file such report, they should be liable for all the debts of the corporation contracted during the period of such neglect. Con-

struing that statute, the Supreme Court of that state held that the liability imposed was in the nature of a penalty, and conferred no contract obligation upon which creditors could rely.

A statute of Connecticut provided that, in the case of every corporation, certificates showing their condition should be filed annually by the president and secretary with the town clerk, and that in case of neglect those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The Supreme Court of that state, construing this statute in *Mitchell v. Hotchkiss*, 48 Conn. 9, said: "We do not see how it is possible to construe this statute as creating, or attempting to create, any relation or duty between the creditors of a corporation and its president. The adoption of such a construction would suggest grave doubts as to the validity of the act which should attempt so arbitrarily to make a debtor out of a stranger to the debt, or, in other words, to make the debt of one person the debt of another. There was no privity between Hotchkiss and the plaintiff. They had no transaction with each other, and the former owed the latter no private duty, from which a promise might be implied." This Connecticut statute came before the Supreme Court of the United States, and its nature was construed by the court in *Steam Engine Co. v. Hubbard*, 101 U. S. 188; and that court held that the Connecticut statute was penal, and must be strictly construed.

The Supreme Court of Illinois, in *Diversey v. Smith*, 103 Ill. 378, defines a "penal statute" thus: "A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part, and penal in the other. The effect, and not the form, of the statute is to be considered, and if its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character."

Cook on Stock and Stockholders (2d ed. § 223), in discussing the enforcement of the statutory liability of stockholders in the courts of a state other than the one in which said corporation was created, uses this language: "In general, when the courts of one state are asked to enforce the statutory liability of stockholders in a corporation created by another state, two things are to be considered: First. Is the statutory liability itself a contract lia-

bility, or a mere penalty? The law is clear that the courts of one state will not enforce penalties imposed by another state. But the usual statutory liability of stockholders is not a penalty. The ordinary statutory liability of stockholders is a contract liability, and will be enforced as such by the courts of all the states. A different rule prevails as to the statutory liability of corporate officers for failure to file reports, or give certain notices or make certain contracts. Such liability is generally construed to be penal, and will not be enforced by the courts of other states."

The section of the Nebraska statute under consideration is almost a literal copy of the 18th section of the 1st article of the Corporation Act of the state of Missouri, approved March 19, 1845, the section of the Missouri law being in the following words: "Every corporation hereafter created shall give notice annually, in some newspaper printed in the county where the corporation is established, and in case no paper is printed therein then in the nearest paper, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any of the said corporations shall fail to do so all the stockholders of the corporation shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given." A corporation of that state having failed to publish an annual notice of its existing debts, and during such default having become indebted, an action was brought against all the stockholders of the corporation for the debt so contracted, on the ground of the default in publishing the annual notice required by the section just quoted. The right of the creditor to maintain the action against the stockholders depended upon whether the statute was in its nature penal; and the Supreme Court of the State of Missouri, in *Cable v. McCune*, 26 Mo. 371, decided that the statute in question was a penal one. The court said: "Our opinion in this case is based entirely upon the penal character of the statute we are called upon to construe. The corporation is required to publish an annual notice of its condition for the information of the public; and the failure to do so renders the stockholders liable for a specified class of demands, existing prior to, or at the time of, such publication. This liability in the event of there being no required publication does

not depend upon the actual injury which the failure to publish may have occasioned in a case, but is absolute, depending only on the proof of publication or no publication. Such a statute can be regarded in no other light than a penal one."

Thus far, we have been reviewing authorities which show that the Nebraska statute under consideration (and statutes like it) is a penal one. We now direct our attention to the argument of counsel for the defendants in error, and the authorities cited by them, that section 136 of the Nebraska statute is, in its nature, contractual; in other words, that the right of action given thereby to the creditors of a corporation against its stockholders for the failure of the corporation to publish the annual statement of its indebtedness is a right of action arising by contract, and, therefore, a vested right, and one that the legislature could not take away by repealing the statute. It is contended that, as section 136 was in force at the time of the organization of the Globe Publishing Company, it became a part of its charter, and that the stockholders thereof, by virtue of such statute, and the organization of such corporation while it was in force, impliedly contracted and promised that, in case the corporation failed to publish its annual statement, they (the stockholders) would pay all the debts that the corporation contracted during the period of such default. But counsel lose sight of the distinction between the liability of a member of a voluntary unincorporated association for the debts thereof, as it existed at common law, and as fixed by statutes declaratory thereof, and the statutory liability of a stockholder of a corporation *de jure*. When the law prescribes what the liability of a shareholder shall be — for instance, that such shareholder shall be liable to the creditors of the corporation for double the amount of his stock, or for a sum equal to the amount of his stock, or for the amount remaining unpaid on his subscription to the stock of such company — the law is then speaking of, and fixing the liability of a stockholder in a corporation *de jure*, as, without an express statute, a stockholder in such a corporation would not be liable for any debt whatever of such corporation. And, when a statute so prescribes and fixes the amount for which the stockholders in a corporation shall be liable, such a law is intended to be a limitation upon the stockholder's exemption from liability for the debts of the corporation, which he would other-

wise enjoy; and persons who organize themselves into a de jure corporation when such a statute is in force incorporate it into, and it becomes a part of, their charter, and they impliedly agree and assent that their liability for the debts of the corporation shall be as fixed by such a law. Where a statute provides that until certain things are done by persons forming a corporation — such as the filing of its articles of association in the office of a public officer — the stockholders in such corporation shall be liable for the debts thereof, such a statute is only declaratory of the common law. Until the requirements of the statutes have been complied with, a de jure corporation would not exist, and the parties thereof would be jointly and severally liable for all the debts contracted by such voluntary unincorporated association of persons. At least, since the time our Norse ancestors settled on the shores of the Baltic sea, it has been the law that, where two or more persons engaged in a common enterprise, each one was liable for the act of the others, and for the debts incurred by the others, in aid of the common object for which the association was formed, or the enterprise undertaken. It is evident that the statute which makes all the stockholders of the corporation liable for the debts thereof until the requirements of the statute have been complied with, necessary to make such a corporation one de jure, cannot be considered a penal statute, as such statute adds nothing to the liability of such parties, nor takes away any right which a creditor of such parties might have had. But where the law commands corporations to do certain acts, as to publish annually a notice of their indebtedness, such a law is addressing itself, not to de facto corporations or copartnerships or unincorporated associations, but to corporations de jure, and the stockholders of such corporations; and, when such a statute declares that all the stockholders of such a corporation shall be liable for all the debts of the corporation if it fails to comply with the requirements of the statute, then such a law is designed as a punishment of the stockholders, and is penal.

Among the authorities relied upon by the eminent counsel for the defendants in error to sustain their argument that the section of the Nebraska statute under consideration was contractual in its nature is the case of *Hawthorne v. Calef*, 2 Wall. 10. An examination of that case, however, discloses that it does not by any

means sustain the contention of counsel. A statute of Maine, passed in 1836, provided that the shares of the individual stockholders of a corporation should be liable for the debts of the corporation, and, in case of deficiency of attachable corporate property or estate, the individual property rights and credits of the stockholder should be liable for the corporation's debts, to the amount of the stockholders' stock. A corporation organized under this law became indebted, and soon after the debt was contracted the legislature of the state repealed the law making the stockholder of a corporation individually liable to a creditor thereof. The creditor, however, sued the stockholder, alleging that the statute referred to was contractual in its nature, that the right of action he had acquired against the stockholder was a vested right, and that it was not within the power of the legislature of Maine to take that right away by repealing the statute. This contention the Supreme Court of the United States sustained in the case just cited. Another case relied on by counsel to support this argument is *Flash v. Conn*, 109 U. S. 371 ; 3 Sup. Ct. Rep. 263. The 10th section of the Corporation Law of the state of New York provided that all the stockholders of every company incorporated under the act should be severally and individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them in such corporation. A corporation having become indebted, the creditors sued its stockholders for the debt, under the section just quoted ; and the Supreme Court of the United States, in construing said section 10, held that the liability created thereby was contractual in its nature. With the doctrine announced by the two cases last cited we entirely agree. The statute of the state of Maine, which fixed the liability of a stockholder of a corporation for the debts thereof at the amount of the stock held by him in such corporation, was contractual ; and whoever became a stockholder in a corporation while that law was in force impliedly assented and agreed that he would be liable for the debts of the corporation to an amount equal to the stock held by him therein. It was a fixed, ascertained and determined liability at the time he became a member of the corporation. It was a law addressing itself to stockholders of de jure corporations, and a law of limitation upon the exemptions that such stockholders would have otherwise enjoyed,

but for such statute. And the same may be said of section 10 of the New York law, construed by the Supreme Court in *Flash v. Conn.* But it is said that this court is committed to the doctrine of the contractual nature of the statute under consideration; and, to sustain this contention, we are cited to *Abbott v. Smelting Co.*, 4 Neb. 416; and *White v. Blum*, 4 Neb. 555. But these cases decide, and decide only, that where persons have attempted to form a corporation, until they shall have complied with the requirements of the statute for that purpose, they are jointly and severally liable for the debts of such association. This conclusion is right, and we adhere to it. But the conclusion reached in these cases resulted not alone from the statute, but could and would have been the same had no statute on the subject existed. Until the statute had been complied with, the Omaha Smelting Company and the Midland Pacific Railroad Company did not become corporations de jure; and until they had become such corporations the parties organizing them were simply members of voluntary unincorporated associations, and as such were liable, both at common law and under the statute, for the debts of such associations contracted by a member thereof within the scope of his authority, and for the purposes for which the associations existed. But we do not mean by anything said here to deny the correctness of the doctrine expressed in many cases that where persons attempt in good faith to incorporate themselves into a valid corporation, and, in such corporation's name, actually enter upon the discharge of corporate functions, and so continue for a considerable time unchallenged by the state, persons who contract with such corporation cannot hold the stockholders thereof liable on such contract because it transpires that, by some mistake or oversight, the corporation had never become a technical de jure corporation. On the contrary, we approve of that rule.

It is conceded by counsel for the defendants in error that section 12 of the New York act, construed in the cases cited above, was and is penal; but it is said that, as the act made the trustees of the corporation liable for not publishing the notice of the corporation's existing debts, a distinction exists between the nature of that act and section 136 of the Nebraska act, wherein the liability is made to attach to all the stockholders of the corporation.

We have reflected much upon this argument, and confess our inability to comprehend the distinction which counsel would draw. We have been unable, after a patient search, to find any text writer supporting the counsel's argument. It may be that the directors of a corporation would be liable for fraud or deceit practiced by them in the name of the corporation upon another; and it may be that they would be liable for any damage which another should sustain, in dealing with such corporation, by the failure of such directors to comply with the law in force governing the corporation. But, if such liability exists, it is not a statutory liability, but a common-law liability, and in either of the cases supposed the liability of the directors would be measured by the damages sustained. If section 12 of the New York act is penal, because it compels the directors to pay the debts of the corporation because they (its managing officers) did not comply with the requirements of the law, it would seem that a statute which makes all the stockholders of a corporation liable for the default of the corporation's directors would also be penal. If the section of the Nebraska statute under consideration is not a penal one, we are at a loss to know how the legislature could frame a penal statute. It certainly is not a statute of rewards. True, the punishment inflicted is pecuniary, but by the provisions of this statute a stockholder who owns ten dollars of stock in a corporation may, under certain contingencies, be compelled to pay a debt of \$10,000 that he did not owe — that he did not contract — and suffer that liability because of the default of another. True enough, the object of the statute was to annually notify to the world the financial condition of the domestic corporations of the state, that parties having transactions with them might have a basis upon which to do their business safely. But this is not the only object of the statute. It is the exercise by the state of its police power. It is based upon principles of public policy, and it was intended as an incentive to stockholders of corporations to see to it that the law of the state was obeyed and, if they neglected their duty in that regard, to punish them for such neglect. We cannot recognize the argument that persons were induced to give the corporations of the state credit because of the existence of this section 136, for this would be to concede that the creditors parted with their prop-

erty upon the understanding that when they did so the officers of the corporation would violate the law which it was their duty to obey.

But, again, counsel for defendants in error say that the nature of the statute under consideration is no longer an open question in this court, as we have decided that the statute was not penal, but contractual. In *Howell v. Roberts*, 29 Neb. 483; 45 N. W. Rep. 923, and again in *Coy v. James*, 30 Neb. 798; 47 N. W. Rep. 208, we did so decide. A somewhat extensive re-examination of the subject, however, constrains us to say that the conclusion reached by us in those cases was wrong, and they must be overruled. We did say, in those cases, that said section 136 of the Nebraska statute was contractual in its nature. We were mistaken. The rule we announced in those cases is not supported by the weight of authority nor, indeed, is it supported by any authority that we have been able to find. We conclude, therefore, that said section 136 was a penal statute, and that all rights of action which accrued thereunder to the creditors of a corporation against the stockholders thereof, and which had not been reduced to judgment, were abrogated by the repeal of said section.

This suit was brought against the Globe Publishing Company and the stockholders thereof jointly. Was the action against the stockholders prematurely brought? We think it was. Cook on Stock and Stockholders (§ 219) thus lays down the rule: "Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets." We have no doubt but this is the general rule, and the better practice, especially in the absence of a statute which authorizes a different procedure, but we are not concerned with what the rule may be in other states and courts. Section 4, article 12, of the Constitution, provides that: "In all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." The word "ascertained," in this provision, we take to mean "judicially ascertained;" and to "judicially

ascertain " the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. Such an ascertainment of a debt due from a corporation could then be ascertained, and ascertained only, within the meaning of this Constitution, in a suit brought by a creditor of a corporation against it; not against the stockholders thereof, nor against the stockholders and corporation jointly. The expression in the constitutional provision just quoted above, "that after the corporate property shall have been exhausted," means "exhausted by judicial proceedings;" that is, when executions issued on judgments or decrees rendered against corporations shall be returned unsatisfied. This constitutional provision is the supreme law of the land, and we are not at liberty to, or desirous of, evading it or construing it away. We think, therefore, that the creditors of a de jure corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until an execution issued upon such judgment has been returned wholly or in part unsatisfied. It follows from this that a creditor's cause of action against the stockholders of a corporation under said section 136 would not accrue until such creditor had sued the corporation for the corporate debt, obtained a judgment thereon, and an execution issued on such judgment had been returned, at least in part, unsatisfied. The judgment of the District Court is reversed, and the action against the stockholders is dismissed. Judgment accordingly

NORVAL, Ch. J., concurs in the judgment solely on the ground last stated in the above opinion.

RYAN, C., having been of counsel, took no part in the decision.*

1. Whether a statutory liability imposed upon officers or stockholders is penal in its nature.—The cases upon this question are collected in a note in 2 Am. R. R. & Corp. Rep. 381. The question is passed upon in the following: Howell v. Roberts, 2 Am. R. R. & Corp. Rep. 365; Wolverton v. George H. Taylor & Co., 2 Am. R. R. & Corp. Rep. 369; Cochran v. Weichers, 2 Am. R. R. & Corp. Rep. 377; Huntington v. Attrill, 7 Am. R. R. & Corp. Rep. 206, and note.

2. Liability of directors for failure to make report — statutes construed.—Under Laws of New York, 1875, chapter 611, section 18, making the directors of a corporation created thereunder, which shall fail to file the

* Reported in 59 N. W. Rep. 683.

annual report required thereby, liable for all the debts of the corporation then existing, or which shall be contracted before such report shall be made, it is essential to the liability of directors that their occupancy of that relation, the default in filing a report, and the debt of the corporation exist at the same time; and where the charter of a corporation expires after the making of an executory contract for work to be performed, and before performance thereof, the directors are not liable for the work because of failure to file a report for the last year of the corporation's existence, since there is no debt before the contract is performed, and at that time there is no corporation. *Gold v. Clyne*, 184 N. Y. 262; 31 N. E. Rep. 980. Nor can the directors be held liable under section 38 of said chapter, declaring that the dissolution of the corporation shall not take away or impair any remedy given against the corporation, its stockholders or officers, for any liability incurred prior to its dissolution, on the ground that the liability of the corporation is incurred when the contract is made, and exists at the time of its dissolution, although it does not become an existing debt until after the dissolution, when the work is finished, and that the default in filing a report then effectually exists. *Ibid.*

By amendment of the by-laws of a corporation the number of trustees, previously fixed at twelve, was reduced to nine, but no certificate of such reduction was filed in the offices of the county clerk and secretary of state, as was required by statute. Only nine trustees were thereafter elected, and a board of that number continued to act as such during several years, and annual reports of the corporation, in accordance with the requirements of Laws of New York, 1848, chapter 40, were signed and verified by the president and six of the nine trustees. Held, that the trustees were not liable for the debts of the corporation, as a penalty imposed by the statute for failure to file such reports, on the ground that six did not constitute "a majority of the trustees," which the statute required. The statute should not be construed as requiring a majority of a constructive board of trustees instead of an existing board. *Wallace v. Walsh*, 125 N. Y. 28; 25 N. E. Rep. 1076. The validity of the reduction of the number of trustees could not be assailed collaterally in an action by a creditor. *Ibid.*

Under New York statutes a director who assigns and transfers all his stock ceases to be a director and is not liable for debts thereafter contracted. *Chemical National Bank v. Colwell*, 132 N. Y. 250; 30 N. E. Rep. 644.

An unliquidated claim for a breach of contract of employment is a "debt," within Laws of New York, 1848, chapter 40, section 12, providing that if any manufacturing company shall fail to make and publish an annual report stating the amount of its existing "debts," the trustees shall be jointly and severally liable for such "debts." *Green v. Easton*, 26 N. Y. Supp. 553.

Under section 16 of the General Corporation Law of Colorado, requiring annual reports of the financial condition of a corporation to be filed in the county in which its business is carried on, and, in case of failure to do so, making the directors liable for the debts of the corporation, where a certificate of incorporation states, in compliance with section 2 of the act, the place and county in which the principal office of the corporation in the state shall be, such reports must be filed in that county, notwithstanding the certificate also states that the principal business of the corporation is to be carried on in

another state. *Tabor v. Commercial Nat. Bank*, 10 C. C. A. 429; 62 Fed. Rep. 383. A judgment against such a corporation for the recovery of money is a debt, within the meaning of the statute, and may be counted on in an action under the statute against a director, without pleading the original indebtedness, there being no question of the time when the debt was incurred. *Ibid.*

An act of Pennsylvania, April 14, 1868, makes the directors of an association incorporated thereunder liable for its debts if they fail to make an annual statement of the amount and character of its property and of its debts, or if they make a false statement. Held, that where they failed to file a statement for three months after their election, though none had been made for over a year previous, and their statement showed it solvent, though it was far from it, they would be liable, both by reason of the delay and false statement, though they were honest in their belief. *Githers v. Clarke*, 158 Penn. St. 616; 28 Atl. Rep. 282.

This class of statutes is considered at length in note to *Gaus v. Switzer*, 2 Am. R. R. & Corp. Rep. 703, 711. See, also, *First Nat. Bank v. Lamon*, 5 Am. R. R. & Corp. Rep. 440, and note.

COLE v. SATSOP R. Co. ET AL.

(Supreme Court of Washington, August 7, 1894.)

1. **CORPORATIONS. LIABILITY TO CREDITORS FOR UNPAID VALID SUBSCRIPTIONS, WHEN SOME SUBSCRIPTIONS INVALID.** Where subscribers for stock of a corporation, with knowledge that some of the stock has been subscribed for by another corporation, pay their subscriptions on some of the stock, they cannot, "as against creditors," defend an action against them for their subscriptions on other stock on the ground that, the subscription by the corporation being invalid, the whole stock was not subscribed for, and, therefore, they are not liable on their subscriptions.

2. **SUBSCRIPTION BY ONE "AS TRUSTEE." PAROL EVIDENCE TO SHOW FOR WHOM MADE. LIABILITY.** Where a person subscribes for the stock of a corporation "as trustee," it may be shown by parol evidence that he subscribed as agent for individuals, thereby making it a "pool" subscription, so as to bind such individuals.

3. **RECEIVER OF A CORPORATION APPOINTED AT SUIT OF CREDITORS. WHETHER HE REPRESENTS RIGHTS OF CREDITORS IN SUIT AGAINST STOCKHOLDERS.** A receiver of a corporation, appointed in a proceeding by judgment creditors after a return of nulla bona on their executions, acquires all the rights of the creditors; and in an action by him for unpaid stock subscriptions the stockholders cannot set up a defense which, though good in an action by the corporation, could not be set up in an action by the creditors individually.

ACTION by Frank B. Cole, receiver of the Pacific Mill Company, against the Satsop Railroad Company and others. There was a judgment for defendants, and plaintiff appeals.

James B. Howe, Thomas Carroll and Dunning, Richards, Murray & Pratt, for appellant. *Parsons, Corell & Parsons*, for respondents.

STILES, J. The complaint in this case, to which a demurrer was sustained, alleged: (1) The incorporation of the Pacific Mill Company under the laws of Washington, with a capital of \$500,000, divided into 5,000 shares of the par value of \$100 each. (2) The incorporation of the Satsop Railroad Company under the laws of Washington, with a capital stock of \$100,000, and having, by its articles of incorporation, authority to subscribe for and acquire stock in other corporations. (3) That the defendants subscribed for the entire capital stock of the Pacific Mill Company as follows: Satsop Railroad Company for 198 shares, C. F. White, as trustee, for 4,300 shares, and other individuals for 502 shares. (4) That said subscription of said C. F. White, as trustee, for said 4,300 shares of the capital stock of the Pacific Mill Company, was made by the said C. F. White, as trustee and agent, for the benefit of all of the shareholders of said Pacific Mill Company, at the request of said shareholders, and upon the express agreement between all of said shareholders that the said subscription was made by said C. F. White in trust for all the shareholders of said company, each of said shareholders to have an interest therein in proportion to the number of shares subscribed for by each subscriber in the individual name of such subscriber; and said subscription so made by said C. F. White, as trustee and agent for said shareholders, was so made in consideration of the mutual promises made to the others by each of said shareholders, and in consideration of the benefits to be derived from being members of said corporation. (5) That the said subscription made by said C. F. White, as trustee and agent for said shareholders, was, after the making thereof, ratified and confirmed by said shareholders, and held and used for their benefit, and was ratified and accepted by the Pacific Mill Company aforesaid as the subscription of said shareholders. (6) That the subscriptions made to the capital stock of said Pacific Mill Company by the said defendants and each of them, individually and by their agent and trustee, the said C. F. White, were made with full knowledge of the subscription of the Satsop Railroad Company for 198 shares of

the capital stock of said Pacific Mill Company. (7) That the Pacific Mill Company had commenced business, incurred a large indebtedness and become insolvent. (8) That the individual interests of the defendants in the subscription of C. F. White, as trustee, were as set forth. (9) That no part of the subscription of C. F. White, as trustee, had been paid, except the sum of \$25,000, by the Satsop Railroad Company, and the amounts owing thereon and unpaid were as set forth. (10, etc.) That C. T. Le Ballister & Co. had recovered a judgment against the Pacific Mill Company for \$5,021.48 and costs; that an execution issued was returned nulla bona; that Le Ballister & Co. had commenced an action, in behalf of themselves and all other creditors who should join them, for the appointment of a receiver and other relief; that the Pacific Mill Company had been adjudged insolvent; that plaintiff had been appointed receiver; that proof of claims had been taken to the amount of \$65,000; that the receiver had demanded of the board of trustees of the Pacific Mill Company that it levy an assessment upon the unpaid subscriptions to the stock of the company to an amount sufficient to pay said indebtedness, which had been refused; that the court, upon the application of the receiver, ordered a levy of fourteen per cent on the said subscriptions, and authorized the receiver to bring suit therefor; that each of the defendants was notified of said assessment, and called upon to pay the same in the sums set forth, but each had failed and refused, and that the Pacific Mill Company was insolvent and had no assets whatever, except the stock subscriptions sued for. Judgment was prayed accordingly.

From the briefs we are assured that the action of the court below was based upon *Hotel Co. v. Schram*, 6 Wash. 134; 32 Pac. Rep. 1002. If so, we think the court overlooked many manifest differences between that case and this, as disclosed by the complaint, which we have set forth with much fullness. It is true that the Satsop Railroad Company was a large subscriber to the capital stock of the Pacific Mill Company, and it is also true that under the decision in *Schram's* case it was not liable for any of its subscription, although it assumed to authorize itself to make the subscription by its articles of incorporation, and that without its subscription the capital of the Pacific Mill Company was not all subscribed for; that it was not authorized to com-

mence business; and that subscribers sued under the same circumstances as Schram was would not be liable. The action against Schram was the ordinary one of a corporation against one of its stock subscribers for the amount of his subscription, and nothing was there considered except the bare legal propositions arising out of the relations of the plaintiff and defendant on the facts. But in the case before us it is pointedly alleged that each of the subscribers had full knowledge of the subscription made by the Satsop Railroad Company, and that each of them paid his individual subscription, the subscription of White as trustee being the only one not paid. Such knowledge and action have frequently been held to constitute a waiver of the right of the subscriber to insist on a full subscription. *Thomp. Liab. Stockh.* § 120; *Mor. Priv. Corp.* § 156, and cases cited; *Hager v. Cleveland*, 36 Md. 476; *Morrison v. Dorsey*, 48 Md. 468; *Musgrave v. Morrison*, 54 Md. 161; *Hotel Co. v. Hunt*, 57 Mo. 126. Great force is added to the reason for thus holding when the purpose of the action is to procure funds with which to pay the creditors of an insolvent corporation. Nearly \$50,000 was paid in by the individual subscribers, the purpose of which payment could have been nothing else but to enable the corporation to commence its proposed business. As against creditors, the defendants cannot rely on the Schram case. The respondents, however, present two other questions which are material:

1. It is sought to hold the respondents for the subscription of "C. F. White as trustee," under the fourth and fifth paragraphs of the complaint. The position of the respondents on this point is that, in the absence of fraud, parol evidence is not admissible to show that the subscription was other than what upon its face it appears to be; that the word "trustee" added to the name of the subscriber in such a case, in making an original subscription, whatever may be its effect as to transfers and other entries upon the books of the company, has no effect whatever; and that the effect of our statute is to relieve the trustee from personal liability, and to charge the trust estate, if any, and not to create a trust where there is no estate, or to charge a third party upon the allegation that he was the real party in interest, and in that way open the door for the admission of parol evidence to vary the contract. The statute referred to is General Statutes, section 1512: "No

person holding stock as executor, administrator, guardian or trustee * * * shall be personally subject to any liability as stockholder of the company, but * * * the estate and funds in the hands of * * * the trustee shall be liable in like manner and to the same extent as the * * * person interested in the trust fund would have been if he or she had been living and competent to act and hold the stock in his or her name." But this law can have no bearing upon a case like this, for if one who has no estate for which he is acting as a trustee can subscribe for stock, and escape liability by affixing the words "as trustee" to his signature, he is being directly aided by the law to commit a fraud both upon the corporation and other subscribers, which was never intended. The first proposition, viz., that parol evidence is not permitted to show that the subscriber "as trustee" is not the real subscriber, has received general sanction in England. *Cook Stock & S.* § 253. But in this country the rule has not been adhered to. *Burr v. Wilcox*, 22 N. Y. 551. While a trustee is not an agent, an agent is an agent, in whatever way he may describe himself. We can see no greater reason for restricting inquiry into this kind of a contract than into any other. In *Stover v. Flack*, 30 N. Y. 64, it was held that, although Stover alone subscribed for the stock, yet, under the arrangement between him and Flack, the latter was a stockholder, and was liable to contribute towards the debts of the corporation. Here the allegation is broadly made that White made the subscription as the agent of the respondents, at their request, and for the benefit of each of them in proportion to his individual subscription. In other words, it was a "pool" subscription by a dummy, which was understood by the corporation, and was ratified by it, as the subscription of the individuals. Nothing could be more strongly stated, and we think a cause of action was alleged.

2. The other point contended for by respondents is that the receiver, being the representative of the corporation and standing in its shoes, cannot maintain the action, because, inasmuch as the stock had not all been subscribed for, and the subscriptions were, therefore, not absolute, the corporation itself could not sue thereon. Perhaps it might be justly argued, from what has been said upon the subject of the alleged waiver of the full subscription, that in this case the corporation could have sued notwith-

standing the subscription of the Satsop Railroad Company. But it is not necessary to so hold in this case, for we think this particular receiver could maintain the action whether the corporation could do so or not. The authorities cited to our attention do not, when examined closely, hold to the contrary. The language used in High on Receivers (§§ 201, 315) is general, to the effect that a receiver is usually only clothed with such rights of action as the person or corporation over whose estate he has been appointed might have maintained; but the same volume recognizes it as usual for receivers to pursue and recover property of an insolvent sufficient to pay creditors (§ 455), and respondents concede that such is the fact. It is to be observed, however, that Mr. High's work, so far as receivers appointed at the suit of creditors in aid of execution are concerned, is based almost entirely upon New York cases, which, in turn, are founded upon the very full provisions of the Code and laws of that state. See chap. 12, tit. "Creditors." But at section 324a the same author gives the same weight to decisions in Maryland and New York holding that, when there were acts of waiver on the part of the subscriber, he would be estopped to defend against a suit on his subscription by a receiver on the ground that the stock had been only partially subscribed, or that he had been deceived by false representations as to the condition of the paid-up capital. *Farnsworth v. Wood*, 91 N. Y. 308, discussed a personal liability imposed upon stockholders to the extent of the par value of their holdings, and did not depend upon subscriptions at all. *Haskell v. Worthington*, 94 Mo. 560; 7 S. W. Rep. 481, is a negative authority on the question of the effect of a waiver, but on the point in discussion it does not support the respondents. The plaintiff appears to have been a common-law assignee of an insolvent corporation merely, who, it is well understood, takes nothing but what is conveyed to him by the deed of assignment, and does not represent creditors. *Bouton v. Dement*, 123 Ill. 142; 14 N. E. Rep. 62. *Mann v. Pentz*, 3 N. Y. 415, depended entirely upon statute, the result turning upon the fact that it was sought to sustain an action by the receiver of a manufacturing corporation against a stockholder by a statute which applied only to moneyed corporations. In *Insurance Co. v. Swigert*, 135 Ill.

150; 25 N. E. Rep. 680, the receiver was appointed upon the application of the state auditor, showing the insolvency of the corporation, and asking that its affairs be wound up. The receiver applied for leave to proceed against certain stockholders to set aside a cancellation of their subscriptions made by agreement with the company some years before. The court held that the transaction amounted to a purchase of its own stock by the corporation, which, as between the parties, was a valid one, and that the receiver stood so exactly in the shoes of the corporation that he could not overturn the arrangement made with stockholders. The opinion is based upon the statute of Illinois, which is a winding-up act of the affairs of insolvent insurance companies, and expressly prescribes the powers of receivers under it, which are held not to constitute them the representatives of creditors, except in the matter of distribution. But on page 172, 135 Ill., and page 680, 25 N. E. Rep., this is said: "Almost all of the cases cited by defendant in error fall in one or the other of the four classes following: * * * (3) Where the receiver was appointed in a proceeding prosecuted by creditors, which was supplemental to execution, and the receiver had the rights of the creditors at whose instance, and to secure whose claims, he was appointed. * * * With the law of such cases we have no fault to find." It is needless to call attention to the fact that the case before us is of the class mentioned. There is no reason apparent why Le Ballister & Co. might not have brought this suit for themselves and such other creditors having unsatisfied judgments as might join them, for there is no specific property to be taken possession of, but it is certainly a common method of procedure for a receiver to be appointed in such cases, and when appointed he represents creditors, and not the corporation, and, by the order appointing him, becomes possessed of the rights of creditors, for the purposes of collection, as fully as though their judgments were assigned to him. The cases cited from Maryland, *supra*, were all cases of this class, not depending upon statute. The judgment is reversed, with directions to the Supreme Court to overrule the demurrer.

DUNBAR, Ch. J., and ANDERS, J., concur; SCOTT, J., concurs in the result; HORT, J., dissents.*

* Reported in 87 Pac. Rep. 700.

Subscriptions not enforceable until requisite amount unconditionally subscribed.— The statutes of Oregon require that one-half of the capital stock of a private corporation must be subscribed before the corporation can be organized ; held, that a subscriber is not liable on his subscription where the requisite half of the stock was not unconditionally subscribed before organization. *Portland & F. R. Co. v. Spillman*, 23 Oreg. 587 ; 32 Pac. Rep. 688. If, however, a subscriber, with knowledge that the requisite one-half of the capital stock has not been taken, attends the meetings of the company and participates in its organization, or does other acts indicating a consent to become a shareholder, and acts as such before the statutory conditions have been complied with, he waives the implied conditions of his subscription, and cannot afterwards refuse to become a shareholder on the ground that the company was not legally organized. *Ibid.* There is no such waiver from the fact that a subscriber, without knowledge that the requisite amount of stock has not been taken, on several occasions consents to and waives notice of a shareholders' meeting, and on one occasion votes by proxy at a special meeting. *Ibid.*

As to the implied condition that all the stock must be subscribed before subscriptions can be enforced, and as to the waiver of such condition, see *Masonic Temple Assn. v. Channel*, 2 Am. R. R. & Corp. Rep. 723 ; *International Fair & Exposition Assn. v. Walker*, 3 Am. R. R. & Corp. Rep. 731 ; *Arkadelphia Cotton Mills v. Trimble*, 4 Am. R. R. & Corp. Rep. 236 ; *Anderson v. Middle & East Tenn. Central R. Co.*, 5 Am. R. R. & Corp. Rep. 345 ; 9 Am. R. R. & Corp. Rep. 245, note 1.

OAKES V. CATTARAUGUS WATER CO.

(Court of Appeals of New York, November 2, 1894.)

1. **CORPORATIONS. PRESUMPTIVE POWER OF PRESIDENT OF WATER COMPANY.** Where a company was organized to construct water works and furnish water to a city, and the president was put in charge of the work of construction, and was on the spot, directing operations, he presumably had power to employ men to secure rights of way, rentals for hydrants, and other privileges necessarily pertaining to the business.

2. **RATIFICATION OF CONTRACT MADE BY PROMOTERS ON BEHALF OF CORPORATION TO BE ORGANIZED.** Where the president of a corporation ratifies, for its benefit, a contract for services to be rendered to the corporation, made by him while acting as a promoter thereof, and such services are performed for the corporation, and the contract providing therefor is one which would have bound the corporation if made by the president after it had acquired a legal existence, the corporation is bound by the contract.

3. In an action against a water company on a contract made by its president, before incorporation, for services to be rendered to the corporation, which was ratified by him after incorporation, while he was in charge of the company's works, by a request for performance, and, after performance, by

an acknowledgment of indebtedness and a promise to pay it, the question whether it was intended by the parties that such ratification should bind the company is for the jury.

4. PUBLIC POLICY. PROMISE, IN CONSIDERATION OF PLAINTIFF NOT ORGANIZING A COMPETING WATER COMPANY. A contract by which plaintiff agreed to refrain from forming a corporation for the construction of water works in a certain city, and from carrying on or prosecuting such work, in order that defendant might incorporate for that purpose, and conduct the business without competition, is not void, as against public policy.

ACTION by Frank S. Oakes against the Cattaraugus Water Company on a written contract for services. There was a judgment of nonsuit, and a motion for a new trial on exceptions ordered to be heard in the first instance at General Term. From an order at General Term (21 N. Y. Supp. 851) denying the motion, plaintiff appeals.

William H. Henderson, for appellant. *D. E. Powell*, for respondent.

O'BRIEN, J. The trial court nonsuited the plaintiff, and the principal question presented by the appeal is whether there was proof made which should have been submitted to the jury. The plaintiff made a request to that effect, which was denied, and an exception taken. The defendant is a corporation organized under the provisions of chapter 737 of the Laws of 1873, and the acts amendatory thereof and supplementary thereto, for the purpose of supplying the village of Cattaraugus with water. The certificate of incorporation was executed on the 3d day of March, 1890, but not filed in the proper office until the 19th day of May following, at which date it is assumed on both sides that the defendant's corporate existence begun. The statute requires the consent of the town authorities of the town, where the operations of the corporation are to be carried on, as a preliminary condition of its creation, and this was procured by the parties promoting the organization of the defendant on the 22d day of February, 1890. The application for this consent was in writing, signed by the seven persons who afterwards became the incorporators, and bears date February 5, 1890, and proves that at that date, if not before, they intended, in case the application was granted, to form the corporation. One George N.

Cowan, an attorney at law, seems to have been the principal promoter of the whole enterprise. His name appears first upon the written application to the town authorities for the consent, and in the certificate of incorporation, and is followed by that of his wife and brother, with four other persons. Upon the organization of the defendant, he and his wife and brother became, respectively, the president, secretary and treasurer of the corporation. This action was brought by the plaintiff to recover the sum of \$1,000 upon a written agreement bearing date February 18, 1890, signed by the plaintiff and by Cowan as attorney for the defendant. The plaintiff's difficulty in the case arises from the fact that this paper was executed, as will be seen from the dates, before the defendant had any corporate existence; and, therefore, in its inception, it was not the defendant's contract, or binding upon it in any form. By the terms of the instrument the defendant agrees to pay to the plaintiff the sum of \$1,000 for his services to defendant in securing right of way, hydrant rental, and placing investments, and things pertaining to the construction of the water works for the village, to be paid at the completion of the work. It was further stated that unless the defendant constructed the works the agreement was to be considered and treated as null and void, but, if it did construct, then the plaintiff's services, for which the compensation was to be paid, should consist in aiding and helping the defendant in the matters above specified, without cash expense to him. It was shown at the trial that the defendant, in its corporate capacity, did construct and complete the system of water works for the village. The work was commenced about June, 1890, and completed before the commencement of this action. The defendant established an office in the village, and retained it while the work was in progress. Cowan was the president and manager of the business, and had full direction and charge, his wife acting as secretary, and his brother as treasurer of the corporation. The plaintiff, upon the request of Cowan, the president, performed services for the defendant of the kind and character prescribed in the contract above mentioned. They do not appear to have been of a very important character, and no proof was given in regard to their value; but, so far as appears, he performed all that was required of him. After the completion of the water works, Cowan, on several occasions,

acknowledged the indebtedness to the plaintiff, and promised to pay it. There is no proof in the record tending to show that the general powers possessed by Cowan as the president of the defendant were limited or restricted by by-laws, or in any other way, and we must assume that he had all the power that the president and general managing agent of such a corporation could exercise in the transaction of the corporate business at the place where its operations were being conducted. The general powers of such an officer may be limited or restricted by the charter or by-laws of the corporation. These restrictions may not be binding on all persons dealing with the corporation under all circumstances, as secret and unknown instructions to a general agent of a natural person do not always bind persons dealing with the agent in ignorance of his actual powers. In this case the president, having full personal charge of the business which the defendant was organized to transact, represented the corporation, and *prima facie* he had power to do any act which the directors could authorize or ratify. *Hastings v. Insurance Co.*, 138 N. Y. 473; 34 N. E. Rep. 289; *Conover v. Insurance Co.*, 1 N. Y. 290; *Booth v. Bank*, 50 N. Y. 396; *Leslie v. Lorillard*, 110 N. Y. 519; 18 N. E. Rep. 363; *Holmes v. Willard*, 125 N. Y. 75; 25 N. E. Rep. 1083; *Patterson v. Robinson*, 116 N. Y. 193; 22 N. E. Rep. 372; *Rathbun v. Snow*, 123 N. Y. 343; 25 N. E. Rep. 379; *Railroad Co. v. Dixon*, 114 N. Y. 80; 21 N. E. Rep. 110; *Mor. Priv. Corp.* §§ 251-253. There can be no doubt, I think, that the contract which is the basis of this action was of such a character, and the objects expressed upon its face were of such a nature, that the president and general manager of the enterprise had the power to make it in behalf of the corporation, whenever it attained a legal existence. The corporation had resolved to do the work, which was put in charge of the president, who was the principal promoter in organizing it. He was on the ground, directing the operations, and must be assumed to have the power to do whatever was necessary in executing the corporate objects. It cannot be doubted that he had power to employ engineers and workmen to construct the works, and to bind the company by contracts for labor and materials. He could also employ men to secure for the company rights of way, rentals for hydrants, and the other things necessarily pertaining to the

business; and, if he could make contracts for that purpose, why could he not adopt and ratify one made by himself, though before the corporation was legally created, but in anticipation of what subsequently occurred in obtaining the consent and filing the certificate of incorporation? We think this was fairly within his general powers, and, if he intended, in behalf of the corporation which he represented, by calling upon the plaintiff to do the things which he had agreed to do in the writing, to adopt and ratify the agreement made before the incorporation, instead of making a new one, and the plaintiff intended to and did perform for the corporation the things specified in the agreement, there is no good reason why the corporation did not become bound by his action. Whether this was the intention and purpose of the president of the defendant and of the plaintiff was, under the circumstances of the case, a question of fact, which should have been submitted to the jury. Ratification is largely a question of intention, to be determined from facts and circumstances as one of fact; and the court was not warranted, under the circumstances, in disposing of the question as one of law.

But it is insisted that the contract, even if regarded as the corporate obligation, is void as against public policy. There was proof given at the trial tending to show that the plaintiff, before entering into the contract with Cowan, contemplated an application in his own name to the town authorities for permission to form a corporation to construct the works, and that the purpose of the agreement was to compensate him for consenting to abandon the enterprise and allow the defendant to obtain the consent, and reap the benefit of the enterprise. It is alleged in the complaint that, at the time of entering into the agreement, it was understood and agreed between the parties that, in addition to the consideration mentioned in the writing for the payment of the \$1,000, the plaintiff was not to prosecute or carry on the business for which the defendant was subsequently organized, and was not to organize any corporation for that purpose, or to ask or receive a franchise from the town authorities for that purpose. It was further alleged that the plaintiff kept and performed these conditions, which were not expressed in the writing, but fully understood between the parties, but did assist Cowan in his efforts to accomplish the purpose originally contemplated by the

plaintiff. These allegations are, however, put in issue by the answer. The proof would have justified a finding by the jury that the plaintiff's promise to abandon the enterprise, and leave the field open to Cowan and his associates, was an element that entered into the contract, and an inducement to its execution. No such purpose, however, appears upon the face of the contract. The consideration there expressed for the payment of the money was services which the plaintiff could lawfully perform, and which it is claimed he did perform, for the defendant. The court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for a purpose other than that stated upon its face. If that question was in the case at all, it was one for the jury, as the evidence was not conclusive, but open to different inferences. But we think that this agreement, upon any view of the facts, does not come within that class of contracts which are forbidden or are held void on grounds of morality or public policy. There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes, or in restraint of trade, or to influence the action of public officials. Assuming that both the plaintiff and Cowan intended to apply for the franchise, and that the latter persuaded the former to abandon his purpose, and aid him in the manner mentioned in the contract, for the consideration promised, there was nothing immoral, or that threatened the public interests or the public good, in such an arrangement. If the business of a private individual or corporation is threatened with competition, it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business, at a stated compensation. Such an agreement, fairly entered into, is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted to but one of them, the arrangement does not, as I conceive, violate any settled rule or principle of public policy. *Match Co. v. Roeber*, 106 N. Y. 473 ; 13 N. E. Rep. 419 ; *Leslie v. Lorillard*, 110 N. Y. 519 ; 18 N. E. Rep. 363 ; *Tode v. Gross*, 127 N. Y. 480 ; 28 N. E. Rep. 469 ; *Thermometer Co. v. Pool*, 51 Hun, 157 ; 4 N. Y. Supp. 861 ; *Cameron v. Water Co.*, 62 Hun, 269 ; 16 N. Y. Supp.

757. For these reasons the judgment should be reversed, and a new trial granted, costs to abide the event.

GRAY, J. (dissenting). If, at the time the agreement set forth in the complaint was made, there had been such a corporation as the Cattaraugus Water Company, then it would be quite conceivable that there might be a ratification by it of the act of a person standing in the relation to it of an officer or agent. Ratification presupposes the doing of an act by an agent which a principal could have authorized. It is defined as an agreement to adopt an act performed for us by another, and is equivalent to an original authority to do the thing in question. But here Cowan represented no one but himself. He and others were proposing to associate themselves in a corporate project. He was a mere promoter, and he had no principal. When the plaintiff entered into the agreement with Cowan, he was bound to inform himself as to whether the latter represented an actual principal. If he neglected to do so, his agreement was worthless, except so far as it imposed upon Cowan, individually, a liability for undertaking to act with no responsible principal behind him. *Dunl. Paley Ag.* *374. We may assume that there was sufficient evidence upon which a jury might have found that there was ratification, if there had been a contract made for the company; but it ought to be perfectly manifest that, unless there had been in esse a corporation de facto or de jure, which could have made Cowan its attorney or agent, there could not be such a thing as a ratification. The rule is stated in *Morawetz Priv. Corp.* (§ 547) as follows, viz.: "A corporation is not responsible for acts performed or contracts entered into before it came into existence, by promoters or other persons assuming to bind the company in advance." Again, at section 549, the author says that "a corporation cannot be charged with the acts or contracts of its promoters by virtue of the technical doctrine of ratification. This doctrine applies only to acts performed on behalf of an existing principal." These statements are amply borne out by the authorities cited by the author, and are founded in clear reason. And see *Railroad Co. v. Magistrates of Helensburgh*, 2 Macq. H. L. Cas. 391, 409. There may, however, be an adoption of agree-

ments made by promoters of companies by a formal acceptance, or, if it is a case where the members of the corporation would be chargeable with knowledge of the contract, and had knowingly received the benefit of an engagement entered into by promoters, adoption might be implied. The adoption of such an agreement by a corporation is equivalent, of course, to the creation of a new agreement, and is governed by all the rules applicable to the formation of a contract under the common law. 1 Morawetz Priv. Corp. § 549. I am unable to believe, and I know of no authority for holding, that adoption, in such a case of a written contract could rest in implication from the mere statements or acts of the interested party who made it, with no evidence to show any knowledge or acquiescence on the part of any other officer or member of the corporation. I think any other view would be a most hazardous one to take for the interests of shareholders in corporations.

Assuming that a corporation may become obligated by a contract made for it before its incorporation, through acceptance or adoption, it should at least appear, in order to justify a verdict from the facts, that those facts established a knowledge by its agents of its existence and of its terms, or that the benefits, the acceptance of which is relied upon to constitute adoption, were of that nature as to presuppose, and to charge the company or its agents with, knowledge of a contract with the person from whom derived. In this case it is not proved that there was any formal or official action upon the agreement, or that any of the directors knew of such, outside of Cowan himself. There was nothing which amounted to a representation by the defendant to plaintiff that the contract was subsisting and valid. *Wilson v. Railway Co.*, 2 De Gox, J. & S. *491. There may have been sufficient evidence in the case to warrant the submission to a jury of the question whether the defendant had not, through its chief officer and manager, become liable to pay plaintiff the value of his services, as the evidence might exhibit that value to be. But this is not such an action. The plaintiff rests his action solely upon the obligation which the agreement set forth imposed upon the defendant, and if, as it is conceded, there could have been none imposed at the time, it could never have become one, in the absence of an adoption of the agreement. As I have said, this

agreement, so far as the record discloses, was never brought to the knowledge of any of the directors, or of the members of the corporation; and it is not at all easy to see what services the plaintiff actually did under it, before or after the company was formed, which could possibly have led any one to suppose that he was under a contract with it, of the nature of the one in question, or of any other nature. We assume, however, that there were services rendered to and accepted by the defendant, but we hold that they were to be recovered for according to their value, and that the contract produced by the plaintiff never became the agreement of the company, so as to obligate it absolutely, and in all events, to pay him the sum stated therein upon the completion of the water works. For these reasons the judgment should be affirmed, with costs.

EARL, PECKHAM and BARTLETT, JJ., concur with O'BRIEN, J.; FINCH, J., concurs with GRAY, J.; ANDREWS, Ch. J., not sitting: Judgment reversed.*

1. Powers of president of corporation.—The powers of the president of a corporation by virtue of his office are considered at length in note to *Wait v. Nashua Armory Assn.*, 5 Am. R. R. & Corp. Rep. 149, 151. See, also, 7 Am. R. R. & Corp. Rep. 160, notes 5 and 6; *Greig v. Riordan*, 99 Cal. 816; 88 Pac. Rep. 918. Where the president is the managing and controlling officer of a corporation and, as such, negotiates and completes contracts on behalf of the corporation, he has power to bind the corporation by acknowledging an error in the contract and consenting to a change therein to correspond to the truth. *Nichols v. Scranton Steel Co.*, 187 N. Y. 471; 88 N. E. Rep. 561.

The president, who is also the general manager and chief executive officer of a corporation, the principal business of which is the investment of its funds in mortgages and other securities, may bring a writ of entry in the name of the corporation to foreclose a mortgage owned by it. *Trustees of Smith Charities v. Connolly*, 157 Mass. 272; 81 N. E. Rep. 1058.

The president of a corporation has no power, without the authority of the directors or stockholders, to consent to the appointment of a receiver to wind up the affairs of the corporation. *Walters v. Anglo-American Mortgage & Trust Co.*, 50 Fed. Rep. 316.

2. Adoption and ratification of contracts made by promoters.—See for treatment of question *McArthur v. Times Printing Co.*, 5 Am. R. R. & Corp. Rep. 748, and note.

* Reported in 88 N. E. Rep. 461.

CORT & CO. v. SUTTON.

(Supreme Court of Michigan, October 16, 1894.)

FOREIGN CORPORATIONS. STATE CANNOT IMPOSE CONDITIONS UPON THEIR RIGHT TO TRANSACT INTERSTATE COMMERCE. Act of Michigan, 1893, No. 79, requiring all domestic corporations thereafter organized and all foreign corporations thereafter permitted to do business in the state, to pay a franchise fee, and declaring all contracts made by them before complying with the act to be void, does not apply to foreign corporations selling goods in the state through itinerant agents, since, if so applied, it would be a restraint upon interstate commerce and void.

R. B. Wilkinson, for appellant. *Bowen, Douglas & Whiting* and *A. N. Ellis, Attorney-General*, for appellee.

HOOKEE, J. The plaintiff, a corporation of the state of Illinois, recovered a judgment in the Wayne County Circuit Court, from which the defendant appeals. The finding of facts shows that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state, to its customers in Michigan, on orders given it by mail, or taken by its agents in Michigan; that on January 23, 1894, the plaintiff, through its duly authorized agent, entered into a written contract with the defendant, in the city of Detroit, Mich., for the sale to him of a quantity of white lead at a specified price, to be paid for upon delivery; that on January 27, 1894, delivery of the lead was tendered at Detroit. The defendant refused to receive the lead, claiming the contract to be void. At the time of making such tender the plaintiff had not filed articles of association in this state, and had not paid to the secretary of state a franchise fee, as provided by No. 79 of the Laws of 1893. Counsel for plaintiff seek to avoid the effect of said act, contending that it is in conflict with the provision of the Federal Constitution that "congress shall have power to regulate commerce among the several states." Art. 1, § 8. The defendant relies upon the familiar rule that states may impose conditions upon the right of foreign corporations to do business within their limits. This rule has been recognized by the federal courts where it does not conflict with the power of congress to regulate commerce. See *Paul v. Virginia*, 8 Wall. 168. But, where the effect is to restrain or obstruct

commerce among the states, it cannot be applied, the federal decisions, to which we must look for a construction of the Constitution, holding that it is the right of persons residing in one state to contract and sell their commodities in another, unrestrained, except where restraint is justified under the police power, by states, or by act of congress, and that this right extends to corporations. *Paul v. Virginia*, 8 Wall. 168; *Brown v. Maryland*, 12 Wheat. 425; *Welton v. Missouri*, 91 U. S. 275; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Webber v. Virginia*, 103 U. S. 344; *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 Sup. Ct. Rep. 739; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181; 8 Sup. Ct. Rep. 737; *Bowman v. Railway Co.*, 125 U. S. 465; 8 Sup. Ct. Rep. 689, 1062; *Moran v. New Orleans*, 112 U. S. 69; 5 Sup. Ct. Rep. 38; *Pickard v. Car Co.*, 117 U. S. 34; 6 Sup. Ct. Rep. 635; *Robbins v. Taxing Dist.*, 120 U. S. 489; 7 Sup. Ct. Rep. 592; *Leloup v. Port of Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep. 1380; *Fargo v. Michigan*, 121 U. S. 230; 7 Sup. Ct. Rep. 857; *Philadelphia, etc., S. S. Co. v. Pennsylvania*, 122 U. S. 326; 7 Sup. Ct. Rep. 1118; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 11 Sup. Ct. Rep. 876; *Brennan v. City of Titusville*, 153 U. S. 289; 14 Sup. Ct. Rep. 829.

The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must, therefore, be held that the act in question does not apply to foreign corporations whose business within this state consists merely of selling through itinerant agents, and delivering, commodities manufactured outside of this state. The judgment of the Circuit Court will be affirmed.

The other justices concurred.*

FOREIGN CORPORATIONS — RECENT DECISIONS.

1. **State taxation and regulation of foreign corporations engaged in interstate commerce.**—The sale of brick in another state, to be delivered in Alabama, is an act of interstate commerce, which is not affected by laws of Alabama requiring foreign corporations to have a place of business and an agent in the state as a condition precedent to doing business therein. *Cook v.*

* Reported in 60 N. W. Rep. 690.

Rome Brick Co., 98 Ala. 409. See, generally, *People ex rel. v. Wemple*, 7 Am. R. R. & Corp. Rep. 732, and note; *Attorney-General v. Fidelity & Casualty Co.*, 6 Am. R. R. & Corp. Rep. 599, and note, 607-612.

2. Validity of contracts made before complying with state laws as to doing business.—Statutes of Massachusetts, 1887, chapter 214, section 77, declaring that no foreign company shall be authorized to do business until it shall have complied with certain conditions, avoids a premium note given such an unqualified company for an insurance effected in the state. *Reliance Mutual Insurance Co. v. Sawyer*, 160 Mass. 413; 36 N. E. Rep. 59.

A contract made in Washington with a foreign corporation is valid, though it has failed to comply with laws granting foreign corporations the right to do business in that state. *Whitman Agricultural Co. v. Strand*, 8 Wash. 647; 36 Pac. Rep. 682.

A statute of British Columbia which provides that, if a foreign corporation transact business in such province without having registered, it shall incur a penalty not exceeding five dollars for every day during which business is so carried on, does not render void contracts made by it without having so registered. *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 870; 36 Pac. Rep. 260.

3. What amounts to doing business in state.—Where an application and premium note are taken in Massachusetts by the agent of an Iowa insurance company, and by him sent to the home office, in Iowa, where they are accepted and the policy is executed, said policy being delivered in Massachusetts, the business of effecting the insurance is done in Massachusetts. *Reliance Mutual Insurance Co. v. Sawyer*, 160 Mass. 413; 36 N. E. Rep. 59.

The institution and prosecution of suits in the courts of Alabama by a foreign corporation is not an act of business therein, and may be done without having a place of business and an agent in the state. *Cook v. Rome Brick Co.*, 98 Ala. 409; 12 South. Rep. 918.

4. Estoppel to deny qualification of foreign corporation.—The General Statutes of Washington, sections 1524-1531, require foreign corporations to comply with certain requisites before doing business in the state, and provide that an agent of such a corporation, doing business therein before the requisites are complied with, shall be guilty of a misdemeanor. Held, that a person contracting with such a corporation before it has complied with the statutory requisites is estopped to deny the authority of the corporation to make the contract, and its capacity to sue thereon. *La France Fire Engine Co. v. Town of Mt. Vernon*, (Wash.) 37 Pac. Rep. 287.

5. Right to make contract cannot be questioned after contract is fully executed.—Where a mortgage to a foreign corporation was originally invalid by reason of the failure of the mortgagee to comply with the laws in respect to declaring a place of business in the state, and authorizing an agent thereat, but the mortgage was foreclosed by a sale and conveyance, the contract evidenced by the mortgage became fully executed by the sale and conveyance, so that the mortgagor could not thereafter avail himself of the objection. *Gamble v. Caldwell*, 98 Ala. 577; 12 South. Rep. 424. This was an action of ejectment by the purchaser at foreclosure sale against the mortgagor.

6. Right to hold real estate — religious corporation.— The Constitution of Missouri, article 2, section 8, provides that “no religious corporation can be established in this state, except such as may be created under a general law, for the purpose only of holding title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries.” Held, that this does not prohibit a foreign religious corporation from holding land in Missouri for the purposes specified. *Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ*, 60 Fed. Rep. 937.

7. How right to hold real estate may be questioned.— The question whether a foreign religious corporation has attempted to acquire more land than it is allowed to hold is one which can be determined only in a direct proceeding by the state. *Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ*, 60 Fed. Rep. 937.

The right of a foreign corporation to take and hold title to real estate cannot be questioned in ejectment by it against a former managing director. *Seymour v. Slide & Speer Gold Mines*, 153 U. S. 523; 14 Sup. Ct. Rep. 847.

8. State insolvent laws do not apply to foreign corporations.— A foreign corporation, having authority, under the laws of its domicile, to make a general assignment for the benefit of its creditors, may make such an assignment in New York, where it is doing business, as Laws 1890, chapter 564, section 48, declaring void every transfer or assignment by a corporation in contemplation of insolvency, refers only to domestic corporations. *Vanderpoel v. Gorman*, 140 N. Y. 563; 35 N. E. Rep. 982.

9. Foreign insurance companies, and regulations pertaining thereto.— Under act of Pennsylvania, April 26, 1887, supplemental to act April 4, 1873, relative to foreign insurance companies, providing that “any insurance company, not of this state, doing business without authority, * * * shall forfeit,” etc.; and “any person or persons, or any agent, officer or member of any corporation, paying or receiving or forwarding any premiums, applications for insurance, or in any manner securing, helping or aiding in the placing of any insurance, or effecting any contract of insurance, * * * directly or indirectly, with any insurance company, not of this state, which has not been authorized” to do business in it, shall be guilty of a misdemeanor, the owner may insure his own property in an unauthorized foreign company without incurring the penalty of the statute. *Commonwealth v. Biddle*, 139 Penn. St. 605; 21 Atl. Rep. 134.

Acts of Tennessee, chapter 31, declares the terms on which foreign corporations organized for mining or manufacturing purposes may do business in this state. Acts 1891, chapter 122, section 1, amends Acts 1877, chapter 31, to include all foreign corporations. Section 2 provides that every foreign corporation, organized “for any purpose whatever,” desiring to carry on business in the state, of any kind, shall first file with the secretary of state a copy of its charter, and record an abstract of the same in the county in which it desires to do business, as required by the act of 1877. Section 3 provides that it shall be unlawful “for any foreign corporation” to do business without having complied with the act. Section 4 provides that, “when a corporation complies with the provisions of this act, it shall then be, to all intents and purposes, a domestic corporation.” Held, that the act of 1891 includes foreign

fire insurance companies, though, by its extension of the act of 1877, privileges are conferred which such companies cannot avail themselves of, and though act 1891, chapter 47, purports to be a compilation of all laws regulating the business of fire insurance companies doing business in the state. LUTTON, Ch. J., dissenting. *State v. Phoenix Fire Ins. Co.*, 92 Tenn. 420; 21 S. W. Rep. 898.

Revised Code of Alabama, section 1180, prohibiting the agent of a foreign insurance company to take any risk or transact any business of insurance in the state, without first procuring a certificate of authority from the auditor, does not prohibit the transaction of business not in the line of insurance, and a bill, therefore, to foreclose a mortgage in favor of a foreign insurance corporation, which merely shows a debt owing to the company, for which security was given, is not demurrable for failing to show a compliance with the statute. *Boulware v. Davis*, 90 Ala. 207; 8 South. Rep. 84.

10. Jurisdiction over foreign corporations — service of process.— Under laws of Oregon (Hill's Ann. Laws, § 516), which provide that no foreign corporation shall be subject to the jurisdiction of the state courts unless it has an agency within the state for the transaction of business or has property therein, the making, within the state, of a contract between a foreign corporation and plaintiff, to be performed in another state, and the service of summons on an officer of the corporation while temporarily within the state, are not sufficient to confer jurisdiction on the state courts. *Aldrich v. Anchor Coal & Development Co.*, 24 Oreg. 82; 32 Pac. Rep. 756.

An act of Nevada, February 25, 1889, provides that foreign corporations shall appoint a resident agent, on whom service of process can be made within the state, and, on failure to appoint such agent, service may be made "by delivering a copy to the secretary of state." Held, that service on the deputy secretary of state, where the secretary was out of the state, was unauthorized and gave the court no jurisdiction. *Lonkey v. Keyes Silver Mining Co.*, 21 Nev. 312; 31 Pac. Rep. 57.

Section 88 of the New Jersey Corporation Act authorizes service to be made upon foreign corporations by serving any "officer, director, agent, clerk or engineer" thereof. Held, that the word "engineer" includes a railroad locomotive driver. *Devere v. Delaware, L. & W. R. Co.*, 60 Fed. Rep. 886.

Service on foreign corporation by serving its secretary while temporarily in the state in attendance on a federal court to testify as a witness in a cause to which such corporation was a party, held, invalid, it appearing that such corporation did no business in the state except selling goods through a traveling salesman, and in one instance buying a stock of goods and selling them through an agent specially appointed for that purpose. *American Woodenware Co. v. Stern*, 63 Fed. Rep. 676.

NEW ENGLAND TRUST CO. v. ABBOTT.

(Supreme Judicial Court of Massachusetts, October 18, 1894.)

1. CORPORATIONS. RIGHT TO PURCHASE THEIR OWN STOCK. A corporation, unless prohibited by statute, may purchase its own stock.

2. VALIDITY OF PROVISIONS IN BY-LAWS AND CERTIFICATES THAT THE STOCK IS TRANSFERABLE ONLY TO THE COMPANY AT AN APPRAISAL FIXED BY THE DIRECTORS. Where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, "subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform," he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void.

3. IMPEACHING APPRAISAL OF DIRECTORS IN SUCH CASE. WANT OF NOTICE. ERRORS OF JUDGMENT. In such case the records of a directors' meeting showing that, by vote of the directors present, a stockholder's shares were appraised at a certain price, and taken for the use of the company, sufficiently show an appraisal, although no notice of hearing was given the stockholder.

4. Where a stockholder agrees to transfer his shares to the company at an appraisal to be made by the directors, the decision of the directors cannot be impeached by showing that they committed errors of judgment in the appraisal.

5. SPECIFIC PERFORMANCE OF AGREEMENT TO CONVEY STOCK TO CORPORATION. A stockholder may be forced to specifically perform a contract to convey his stock to the corporation, according to an appraisal made by the directors, to be disposed of by them as they may see fit, where the evidence shows that none of the stock of said corporation has ever been sold on the market or otherwise than by transfer to the directors, and no fraud in the appraisal is charged, the remedy by an action for damages being inadequate.

ACTION by the New England Trust Company against Abbott, executor of the will of Josiah G. Abbott, deceased, to compel a transfer to the company of certain shares of its stock held by defendant's testator, and to enjoin defendant from further prosecuting an action at law to recover the dividends on said shares. Judgment for plaintiff.

W. G. Russell and J. L. Stackpole, for plaintiff. *L. S. Dabney and F. J. Stimson*, for defendant.

MORTON, J. This is a bill brought by the plaintiff to compel the transfer to it, by the defendant, as executor of the will of Josiah G. Abbott, of certain shares in the plaintiff corporation, which were held by said Abbott at his decease, and which, it is

alleged, he agreed, when the certificates were issued to him, should be appraised at his death by the directors, and transferred to the plaintiff at the appraisal, if the directors so elected. The bill also seeks to enjoin the defendant from prosecuting an action at law brought by him against the plaintiff to recover certain dividends upon said shares that have been declared by it.

The plaintiff was organized in 1869, under a special charter (Acts 1869, chap. 182), with a capital of \$500,000, which was afterwards increased to \$1,000,000. The terms of the alleged agreement are found in the by-laws, of which all that is now material is as follows :

“ Art. 7. Any member of this corporation who shall be desirous of selling any of his shares, the executor or administrator of any member, deceased, and the grantee or assignee of any shares sold on execution, shall cause such, their shares, respectively, to be appraised by the directors, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the corporation at such appraised value; and, if said directors shall choose to take such shares for the use of the corporation, such member, executor, administrator or assignee shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said corporation; provided, however, the said directors shall not be obliged to take said shares at the appraised value, unless they shall think it for the interests of the company; and if they shall not, within ten days after such shares are offered to them in writing, take the same, and pay such member, executor, administrator or assignee the price at which the same shall have been appraised, such member, executor, administrator or assignee shall be at liberty to sell and dispose of the same shares to any person whatever.

“ Art. 8. The directors shall have power, and it shall be their duty, to sell and dispose of the shares which may be transferred as aforesaid to the corporation, whenever, in their judgment, it can be done with safety and advantage to the corporation; and in all sales made by the directors, under any of the aforesaid provisions, it shall be their duty to sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution, no

greater number than one hundred shares being assigned to any one person, nor, in the case of a person already a member, a greater number than will be sufficient to increase his previous number to one hundred shares."

These by-laws were adopted before any certificates of stock were issued. Afterwards, but before the capital was increased, article 7 was amended by adding to it the following:

"It shall be the duty of such executor, administrator, grantee or assignee to offer said shares for appraisal, and to be taken by the corporation, if it shall so elect, whenever requested by the actuary or secretary, and no dividends or interest shall be paid or allowed after a failure to comply with such request; provided, that such request shall not be made until after the payment of one dividend and the expiration of six months from the death of the owner or sale as aforesaid, but the offer may be made at any earlier period if the party shall prefer."

Every certificate contained on its face, as part of the certificate, the provision that "said shares are transferable only in person or by attorney, duly constituted, on the books of the company, and in the manner and upon the conditions expressed in the by-laws of the company, printed upon the back of this certificate." On the backs of the certificates were printed by-laws 7 and 8. By-law 7 was printed as amended on the backs of those issued after the increase. There were also on the stubs from which the certificates were detached, in the certificate books, two receipts given and signed by the defendant's testator at the time the two certificates were issued to him in the original and increased capital, which were each as follows: "Received the above certificate subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform." The defendant contends that these by-laws are void. We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case may well stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do. It is manifest that a stockholder may make a contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain rights, or to submit to certain restrictions respecting which the stockholders

might have no power of compulsion over him. In *Adley v. Whitstable Co.*, 17 Ves. 315, 322, Lord ELDON says: "It has been frequently determined that what may well be made the subject of a contract between the different interests of a partnership would not be good as a by-law. For instance, an agreement among the citizens of London that they would not sell except in the markets of London would be good; yet it has been declared by the legislature that a by-law to that effect is void." See, also, *Davis v. Proprietors, etc.*, 8 Metc. (Mass.) 321; *Bank of Attica v. Manufacturers & Traders' Bank*, 20 N. Y. 505; 6 Cook Stocks & S. § 408. In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he must be held to have agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in by-laws which may have been invalid as such does not render his agreement void, if the contract was in substance one which the corporation had power to make. We think that it had such power. It is held in this state that a corporation, unless prohibited, may purchase its own stock. *Dupee v. Water Power Co.*, 114 Mass. 37; and we see nothing opposed to public policy in such an agreement as this with corporations like this. If honestly carried out by the directors, it tends to secure a trustworthy body of stockholders, from which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill who possess the confidence of the public. The restraint upon alienation is no greater than is often agreed to. In England it is not unusual to find in the deeds of settlement or articles of association under which corporations or joint stock companies have been organized, and which correspond to the charter and by-laws here, provisions requiring the stockholder, in case he wishes to transfer his stock, to offer it to the directors, or to submit to them the name of the transferee for approval. *Bargate v. Shortridge*, 4 H. L. Cas. 297; *Poole v. Middleton*, 29 Beav. 646; *Ex parte Penney*, 8 Ch. App. 446; *Moffat v. Farquhar*, 7

Ch. Div. 591; Chappell's case, 6 Ch. App. 902. No objections seem to have been made to these provisions. In this state the legislature, in numerous instances, has provided, in the charters of corporations like this, that the shares shall be transferable according to such rules and regulations as the stockholders shall establish, and not otherwise. It is hardly possible that the legislature was ignorant of the construction which has been put upon the power thus conferred, and which in the case of the first corporation of the kind chartered in the commonwealth, the Massachusetts Hospital Life Insurance Company (Acts 1818, chap. 180) was shown, it is said, by the adoption of by-laws from which those in this case were copied. It is true that this charter contains no provision in regard to by-laws or to the transfer of shares; but the policy of the legislature cannot be affected by such an omission, especially in view of the fact that many of the charters since granted contain this provision.

Neither do we think that the agreement is void for the reason that it authorizes the plaintiff to invest, as the defendant contends, in its own stock, or because it compels the defendant to submit to the appraisal of the directors. If the enumeration in its charter of certain things in which it may invest is to be construed as excluding, among others, its own stock, we think that the object of the agreement is not to secure the transfer of the shares to the plaintiff as an investment, but to enable the directors to dispose of it to such person or persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; and though, pending its disposition by the directors, it may, for convenience's sake, be placed with the company's securities, and dividends, if declared, collected upon it, that does not alter the essential character of the tenure upon which the company holds it. It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested; provided the interest was known, and no objection made by the parties, and no fraud or bad faith is shown. *Brown v. Bellows*, 4 Pick. 179, 189; *Palmer v. Clark*, 106 Mass. 373, 389; *Haley v. Bellamy*, 137 Mass. 357, 359; *Fox v. Hazelton*, 10 Pick. 275; *Strong v. Strong*, 9 Cush. 569; *Benj. Sales* (6th Am. ed.), § 88, note 8.

The defendant objects that there was no real appraisal, and that he did not offer the stock for appraisal. The records of the plaintiff show that at a directors' meeting, at which were present sixteen directors, it was voted that the defendant's stock be appraised at \$220 per share, and taken for the use of the corporation. The directors were not bound to give the defendant notice or a hearing (*Palmer v. Clark, supra*); and we must assume that they gave the matter such attention as, in their opinion, was necessary, and that the appraisal correctly expresses their judgment, after taking into account such matters as they thought should be considered. There is nothing to show that they were so mistaken about the facts that what they did was in no fair sense an appraisal of this stock, but of something else. It is said that they omitted the good will. If so, it was, at most, an error of judgment, which would not invalidate the appraisal. It was not a condition precedent to the appraisal that the defendant should offer the stock. The agreement of defendant's testator was, in substance, that the stock should be appraised by the directors, and that it might be taken at the appraisal by them if they so elected, and that has been done. The offer was for the purpose of fixing a time from which the ten days should begin to run at whose expiration the stockholder could dispose of his stock if the directors had not elected to take it. If the directors appraised the stock, and voted to take it at the appraisal, an offer was unnecessary.

Lastly, the defendant contends that the plaintiff is not entitled to specific performance, because the stock was greatly undervalued, and because the plaintiff has a remedy at law. It is evident that to remit the plaintiff to an action at law for damages would defeat the very purpose of the contract, and would not, we think, furnish an adequate remedy. No stock in the plaintiff company has ever been sold in the market, and all the shares that have been transferred have been transferred to the plaintiff, and disposed of by the directors in the manner provided. About three-fourths of the stock of the original subscribers has been thus transferred. There is no evidence that the testator ever objected to this mode of dealing with it; and we see no good reason why the plaintiff should be obliged to accept damages for which it might be difficult to lay down a clear rule,

instead of performance. *Railroad Corp. v. Babcock*, 6 Metc. (Mass.) 346; *Cushman v. Manufacturing Co.*, 76 N. Y. 365. The case would perhaps stand differently if the shares were bought and sold in the market like most stocks. *Adam v. Messenger*, 147 Mass. 185; 17 N. E. Rep. 491. The defendant does not charge the directors with any fraud in the appraisal. He expressly disclaims that. It is well settled that where one agrees that another may fix the price for certain property, or the sum to be paid for material or services, the decision of the party selected cannot be impeached by showing that he has committed an error of judgment, or failed to avail himself of all the information which he might have obtained, or has valued the property too high or too low. *Palmer v. Clark*, *supra*; *Flint v. Gibson*, 106 Mass. 391; *Robbins v. Clark*, 129 Mass. 145; *Railroad Co. v. March*, 114 U. S. 549; 5 Sup. Ct. Rep. 1035; *Stevenson v. Watson*, 4 C. P. Div. 148; *Sharpe v. Railway Co.*, 8 Ch. App. 597; *Richards v. May*, 10 Q. B. Div. 400; *Tullis v. Jacson*, (1892) 3 Ch. Div. 441; *Ranger v. Railroad Co.*, 5 H. L. Cas. 72. The evidence that was offered by the defendant relating to the value of the stock was, therefore, rightly excluded. It is equally well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced. *Chute v. Quincy*, 156 Mass. 189; 30 N. E. Rep. 550; *Lee v. Kirby*, 104 Mass. 420; *Park v. Johnson*, 4 Allen, 259; *Railroad Co. v. Babcock*, 6 Metc. (Mass.) 346, 352; *Cathcart v. Robinson*, 5 Pet. 271; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339; *Belchier v. Reynolds*, 2 Keny. pt. 2, 87; *Weeks v. Gallard*, 21 Law T. (N. S.) 655; *Fry Spec. Perf.* (3d Am. ed.) § 424, note 1. It is to be observed that this is a suit directly between the company and a stockholder, to enforce a contract made with the company by the latter, and that the rights of third parties are not involved. Many of the cases cited and relied upon by the defendant are cases where the rights of third parties are involved, and, therefore, inapplicable to this.

The result is that the plaintiff is entitled to a decree com-

selling the defendant to convey the shares upon payment by it of the amount of the appraisal, with interest, and enjoining him from prosecuting the action at law. Ordered accordingly.*

1. Power of corporation to purchase its own stock.—It is held in the following cases that a corporation may purchase its own stock, in the absence of any statute to the contrary: *Rollins v. Shaver W. & C. Co.*, 80 Iowa, 380; 45 N. W. Rep. 1037; *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99; 14 S. E. Rep. 501. For treatment of subject, see 1. *Mor. Priv. Corp.* §§ 112-114, 484; *Beach Priv. Corp.* § 395.

2. Power cannot be exercised to the prejudice of creditors.—Though a corporation may purchase shares of its own stock when not prohibited from so doing, the stockholders are subject, in proper cases, to the rights of corporate creditors to resort to the capital stock as a trust fund for the payment of their debts. *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99; 14 S. E. Rep. 501; *Heggie v. Building & L. Assn.*, 107 N. C. 581; 12 S. E. Rep. 275.

3. By-laws restricting right to sell stock.—A business corporation cannot make it a condition of transferring stock that the holder shall first have offered it to the directors, and shall have paid all his indebtedness to the corporation. *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.*, 118 Mo. 447; 24 S. W. Rep. 129. When no restriction is placed by state law on the transfer of corporate stock, one who purchases such stock is not affected by any contractual restriction on the powers of transfer of which he has no notice. *Ibid.* Where a corporation adopts a by-law making transfers of stock subject to a lien for any indebtedness of the owner to the corporation, and resolves that such by-law be printed on all certificates of stock as a notice to purchasers of the existence of such lien, it cannot claim the lien as against an innocent purchaser of stock, the certificate of which was thereafter issued without containing such conditions. *Ibid.*

YALE GAS STOVE CO. v. WILCOX ET UX.

WILCOX v. FOLEY.

(Supreme Court of Errors of Connecticut, February 19, 1894.)

1. CORPORATIONS. PROMOTERS. LIABILITY OF FOR SECRET PROFITS OBTAINED FROM SALE OF PROPERTY TO CORPORATIONS. Promoters occupy a fiduciary relation toward the company or corporation whose organization they seek to promote.

2. A secret contract, between an owner of patents and a promoter, that the latter shall form a company to buy said patents for a certain price, and manufacture thereunder, the patentee to pay the promoter one-half of the price received, is void, as against public policy.

* Reported in 38 N. E. Rep. 432.

3. When a promoter, having secretly agreed with a patentee to form a company to buy his patents, the patentee to pay him half of the price received, induces subscriptions by stating that he is subscribing on equal terms with the rest, and, being elected a director, votes for the resolution to buy the patents, the company may recover of him his secret profits; and it is not obliged to rescind the purchase, and so destroy its own reason for being.

4. The fact that its real contract of purchase was covered by a sham form, to avoid the joint-stock law, will not prevent the company from recovering his secret profits thereon from its director by suit in equity.

5. SUIT THEREFOR PROPERLY IN NAME OF CORPORATION. A suit against a director for his secret profits on a sale to the company is properly brought by the company, and not by its stockholders.

ACTION by the Yale Gas Stove Company against Jedediah Wilcox and wife for damages and equitable relief, heard with an action by said Wilcox against John B. Foley for damages for breach of contract. Cases reserved on facts found for advice of court. Judgments advised for plaintiff in the first case, and in the second for defendant.

Following are the facts as found:

“In December, 1889, John B. Foley, being the owner of certain valuable patents for inventions in gas stoves, which he was desirous of disposing of, offered, in a conversation with Jedediah Wilcox, to sell said letters patent for the sum of \$2,500. The said Wilcox, believing said letters patent to be valuable, and having had experience in the organization of joint-stock companies for similar purposes, proposed to said Foley the organization by said Wilcox of a joint-stock company for manufacturing gas stoves under said patents, the sale to such company of said letters patent and a division between said Foley and Wilcox of the avails of such sale. Said Wilcox, after interviews with various persons, believing that he could organize such a joint-stock company for the purpose of carrying out said plan of organizing such company to manufacture said stoves under said patents, and of selling such letters patent to such company and dividing between himself and Foley the avails of such sale, on the 14th day of January, 1890, entered into the following agreement with said Foley: ‘This agreement, entered into this 14th day of January, 1890, by and between John B. Foley, of the town and county of New Haven and state of Connecticut, of the first part, and Jedediah Wilcox of said town and county, of the second

part, witnesseth as follows: Whereas, said John B. Foley is the owner of letters patent of the United States of America, dated the 30th day of August, 1887, and numbered 368,938, for improvements in gas stoves, and he is also the inventor of a certain other improvement in gas stoves, for which he has applied for letters patent of the United States, by application filed the 14th day of November, 1889, and serial number 330,244; and whereas, said Jedediah Wilcox is desirous of owning one-half part of the letters patent and of the invention and improvements above described: Now, therefore, in consideration of the covenants hereinafter contained, and of one dollar, and other valuable considerations, the said Jedediah Wilcox hereby covenants and agrees with said John B. Foley, and with his heirs and assigns, that he, together with his associates, will forthwith, and within a reasonable time, organize a joint-stock company under the statute laws of the state of Connecticut, for the manufacture and sale of gas stoves containing the improvement described and secured by said letters patent of the United States, and to be secured; and said Wilcox also agrees to cause to be paid to said Foley the sum of three thousand dollars, in cash, upon the organization of said company, and also five thousand dollars of the capital stock of the company above described. Said John B. Foley, his heirs and assigns, hereby covenants and agrees with said Jedediah Wilcox, and with his heirs and assigns, that, upon the execution of his covenants herein above described, he will assign and transfer, by written conveyance, one-half of the letters patent above described; also one-half of the invention and improvements in gas stoves for which application for letters patent has been made, and of any letters patent which may be issued for said improvements; and also that he will assign to said Wilcox one-half of any future improvements which he may hereafter invent in gas stoves while he is associated with him in the gas stove business; and also one-half of any letters patent which may be issued to him for any of the improvements above mentioned, invented while so associated with him in said gas stove business, or any reissue thereof. Said Foley also covenants and agrees to give said Wilcox one-half of the three thousand dollars cash, as soon as received, and one-half of the five thousand dollars of the capital stock of said company, as he shall

receive it. Said Jedediah Wilcox also hereby agrees to subscribe for one thousand dollars, par value, of the capital stock of said proposed company, and to pay for the same as called for by the directors thereof. And said John B. Foley hereby agrees to take one-half of said one thousand dollars worth of stock, when issued, and to pay to said Wilcox therefor one-half of what said one thousand dollars worth of stock shall have cost him. And said John B. Foley hereby also agrees to unite with said Wilcox in the execution of all necessary papers giving to the proposed company, and to all other companies organized for similar purposes, the full right to manufacture and sell gas stoves containing the improvements secured by all the letters patent above described, whenever so requested by said Wilcox. In witness whereof we have hereunto set our hands, the day and year above written. [Signed] John B. Foley, Jedediah Wilcox. Signed and delivered in the presence of Julius Twiss.'

"The said Wilcox performed the work of procuring subscribers for the stock of the contemplated company, and of organizing said company, and carrying out said plan for the sale to said company of said letters patent. It was agreed between said Wilcox and Foley that said agreement and arrangement between themselves that said Wilcox should receive a share of the avails of the sale of said patents to said company should be kept secret. The plan for the organization of such company, and which was stated by said Wilcox to those whom he solicited to subscribe for the stock of said company, and who became the stockholders of said company, and upon which said company was organized, was as follows: The capital stock of the company was to be \$30,000, divided into 600 shares of \$50 each. There were to be ten subscribers of said stock, of whom said Wilcox was to be one, each of whom was to subscribe for twenty shares, and to pay in \$600 in cash. After the organization of the company, the company was to purchase of Foley the said letters patent, paying him therefor \$3,000 in cash, and issuing to him 400 shares of paid-up stock of the par value of \$20,000, for which said Foley was to subscribe. After having received said stock, said Foley was to transfer twenty shares to each of said ten subscribers to the stock of said company, and one hundred shares to the treasurer of said company, retaining the remaining one hundred of said four hun-

dred shares, which, with said \$3,000, was to constitute the purchase price of said letters patent. Thereby, each subscriber, by payment of \$600, was to receive stock of the par value of \$2,000; said Foley was to receive for his patents \$8,000, \$3,000 being in cash, and the remainder in paid-up stock; and there was to remain in the treasury of the company, as its working capital, \$5,000 in stock and \$3,000 in cash. Said Wilcox, in soliciting subscriptions for said stock, did not inform any person of said agreement between himself and Foley, or that he was to receive any of the avails of the sale of said patents, but, for the purpose of inducing persons to subscribe for said stock, stated to nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he (Wilcox) was putting his money into said enterprise upon precisely the same basis as the others of said subscribers; and it was with that understanding that nearly all said persons subscribed for said stock. Said Wilcox, with nine others, subscribed for said one hundred shares of said stock, each receiving ten shares and each paying the sum of \$600. Said Wilcox was present at the first meeting of the stockholders, and was elected temporary clerk and a director, and voted in favor of the following resolution, which was adopted: 'Whereas, John B. Foley is the owner of certain letters patent of the United States for improvements in gas stoves, issued to said John B. Foley (the one, No. 368,938, granted August 30, 1887; the other, No. 421,258, granted February 11, 1890); and whereas, said letters patent are necessary and convenient for the purpose of this company, and are valued at the sum of twenty-three thousand dollars; and whereas, the said John B. Foley is a subscriber for the capital stock of this corporation to the amount of twenty thousand five hundred dollars: Therefore, voted, that the directors be, and hereby are, authorized and instructed to purchase said letters patent Nos. 368,938 and 421,258 from said John B. Foley for the sum of twenty-three thousand dollars, and to pay him for the same by crediting his stock account the amount of his subscription, to wit, twenty thousand dollars, and issuing to him full-paid certificates for same, and to pay him the balance of said purchase price, to wit, three thousand dollars, in cash.' On the same day, at the first meeting of the directors of such corporation, said Wilcox was present, and voted in favor of the fol-

lowing resolution, which was passed: 'Voted, to purchase of John B. Foley, as authorized and instructed by vote of the stockholders passed this day, letters patent of the United States Nos. 368,938 and 421,258, and that in payment therefor the president and secretary be instructed to issue to him stock certificates, full paid, to the amount of twenty thousand dollars, and that the treasurer be instructed to pay him the sum of three thousand dollars in cash, upon receipt of proper deeds of said letters patent.' At a meeting of the directors of the plaintiff corporation, held February 24, 1890—three days after the organization of the corporation—it was agreed between Foley and the Yale Gas Stove Company that three notes for one thousand dollars each, payable two, four and six months from that date, should be given by the company, and accepted by Foley, in place of the \$3,000 in cash which it had been arranged should be paid Foley as a part of the purchase price of said letters patent. Said Foley was also a director of said corporation. Said three notes were duly received by said Foley, and 400 shares of paid-up stock of said company, of the par value of \$20,000, were issued to said Foley, in payment of his subscription for said amount of stock. As soon as could be conveniently arranged thereafter, he transferred to each of his ten associate subscribers, including said Wilcox, twenty shares of the stock so issued to him, and also transferred to the treasurer of the corporation one hundred shares of said stock; and, between Wilcox and Foley, transfers were made, as provided in said agreement, between them, Foley receiving ten of the twenty shares subscribed for by Wilcox, and Wilcox receiving on or before December 1, 1890, from Foley, fifty of the one hundred shares issued to Foley as a part of the purchase price of said patents. The first note for \$1,000 was paid to said Foley, and out of the proceeds thereof, on April 30, 1890, he paid to said Wilcox \$300, which was expressed to have been received by Wilcox on 'account of contract.' When the second note matured, though the corporation had the funds in the bank to pay the same, and though said Foley could have had the payment of the same at once, and was requested by said company to receive payment, yet Foley declined to receive payment. His reason for so doing was his unwillingness to pay any further sum to Wilcox. Foley did not draw

the payment of the second note until a few days before the 9th of October, 1890, and on the 9th of October, 1890, he paid Wilcox \$500, and took from him a receipt for such sum 'on account.' Foley did not draw the payment of the third note when due, although he could then have done so, and was requested so to do by the company. Said note has never been paid, and said company, having learned of said agreement between Foley and Wilcox respecting the division of the proceeds of the sale of said patents to the company, now decline to pay the same. Payment of said note has never been demanded by said Foley. His reason for not having demanded the same was his unwillingness to make any further payment to Wilcox.

"On the ——— day of ———, 1891, Wilcox brought suit against Foley upon the said written agreement between them, the same being one of the suits in which this finding is made. If said agreement between Foley and Wilcox is valid, there is due thereon from Foley to Wilcox the sum of \$1,000. After said suit was brought, the terms of the written agreement between Wilcox and Foley first became known to the directors of the Yale Gas Stove Company, whereupon said company, having been advised that said agreement between Wilcox and Foley was illegal and void, instituted their action against said Wilcox, which is one of the cases in which this finding is made. Of the eighty shares of stock so received by said Wilcox, five shares had been transferred by him to one Starr before the commencement of said suits, fifty-five of said shares stand in the name of Henrietta B. Wilcox, and twenty are owned by said Wilcox. Of the fifty-five shares owned by Henrietta B. Wilcox, twenty shares were the shares originally subscribed for by Wilcox in his own name. He in fact acted at the request of his wife, and as her agent, in making such subscription, and the \$600 paid for said stock was the money of said Henrietta B. Wilcox. Said twenty shares were issued to said Wilcox as trustee. Twenty shares were afterwards, at the request of Wilcox, transferred to her by said Foley as bonus upon said subscription. The remaining fifteen of said fifty-five shares were transferred to said Henrietta B. Wilcox by her husband in consideration of an indebtedness of said Wilcox to his wife in about the sum of \$800. Said Wilcox at no time informed his wife of said agreement between himself and Foley. Since its formation

said corporation has continued to manufacture and sell gas stoves under said patents, the business of said company has been prosperous, and said company has paid in each and every year upon its capital stock dividends ranging from 10 to 16 per cent. I find the value of said stock to be \$50 a share. Said corporation has never offered to return or transfer to either said Foley or said Wilcox said patents, or any part or interest therein, and has not done any act in rescission of its purchase of said inventions.

“At the request of all the parties to said causes, the questions of law arising upon the same, and upon said facts, are reserved for the advice and consideration of the Supreme Court of Errors, next to be holden at New Haven, within and for the third judicial district, on the third Tuesday of January, 1894, except that judgment is rendered in favor of Henrietta B. Wilcox in the first-entitled case.”

John W. Alling, for the Yale Gas Stove Company and John B. Foley. *William L. Bennett*, for Jedediah Wilcox.

FENN, J. Upon the facts appearing upon the record, it is claimed in behalf of Jedediah Wilcox, the defendant in the principal case, that the agreement between Foley and himself was a valid and proper contract, which could be carried out without fraud, and contemplated none; that, therefore, when he began to solicit subscriptions to the stock of the new corporation, he had an interest in the patents; that he was in fact a partner with Foley; that in making this contract with Foley he acted wholly for himself, and stood in no fiduciary relation to the Yale Gas Stove Company, or any of its stockholders. “There was,” says his counsel, “no man, and no body of men, who had any hold upon him, at the time he made this contract, nor any to whom he owed a duty, nor any selected, and in contemplation, to whom he might owe a duty.” The objections “that a resale to some new corporation was contemplated; that the purchase price was to be new stock of such corporation; that but little time elapsed between the two contracts,” are said to be “all met and answered” by the cases of *Mining Co. v. Brookes*, 34 Ch. Div. 398, and on appeal, 35 Ch. Div. 400; *Gover’s case*, 20 Eq. Cas. 114; *Phosphate Co. v. Erlanger*, 5 Ch. Div. 73; and

Erlanger v. Phosphate Co., L. R., 3 App. Cas. 1218. It is further said that these cases, and also the case of *Barr v. Railroad Co.*, 125 N. Y. 263, 277; 26 N. E. Rep. 145, and *In re Cape Breton Co.*, 29 Ch. Div. 795, are authorities for the defendant's further claim, that, "if it be assumed that Mr. Wilcox, as director, or while holding a fiduciary relation to the corporation, sold the patents to it without disclosing his interest therein, such sale is yet not void, but is voidable only," and that "but two courses are open to the company, to wit, they could affirm the sale or rescind it, return the patents and sue for the price. They cannot, as they are here attempting, keep the patents, and recover the consideration received by Wilcox from Foley.

In the light of the above claims we will first examine the cases cited in their support, and see precisely what they hold. The principal and most recent of these English cases is that of *Mining Co. v. Brookes*, *supra*, in which the facts were that on February 1, 1873, one Palin and three associates purchased a leasehold mine for £5,000, with a view of reselling it at a profit to a company to be formed. They afterwards made a provisional contract with a trustee for an intended company for £18,000 in cash. The company was formed, having for its principal object the purchase of the mine; and Palin and his associates received their purchase money, of £18,000, April 4, 1873. The contract of February 1, 1873, was not disclosed to the company, nor did it become known to it until about June, 1883, after it had gone into voluntary liquidation. In June, 1883, the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions—one against the executors of two deceased vendors, and the other against the two surviving vendors—to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary capacity to the company at the time they bought the mine. It was held that the evidence failed to show this to be the fact, and that they were not liable to refund the profit they made on the transaction. The judgment of Justice STIRLING, 34 Ch. Div. 398, was appealed from; and this appeal constitutes the case in 35 Ch. Div. 400, in which the former judgment was sustained. There are several opinions. In that by Cotton, L. J., it is said

that the plaintiff claims that the defendants stood in such a position at the time of their purchase that they could not have claimed to have bought the mine for themselves, and could not, therefore, sell it at an advanced price to the company. This is said to be mainly a question of fact, and on that question the contract of February 1, 1873, was, in its terms, perfectly absolute, and not dependent on any company being formed; that though, doubtless, it was contemplated a company should be formed, no part of the purchase money was to be provided for out of the funds of the company, or to consist of shares of the company. And it is added: "One thing which is very strong in favor of the defendants is that the whole of the price, £5,000, was in fact completely paid when the lease was granted, out of their own money, and not in any way out of money provided by means of this company." And, finally, it is said that the facts found did not make the defendants, at the time when they entered into the contract to purchase, persons so acting as to entitle the company afterwards to say: "When you bought this mine, you were acting for us. This purchase, although made by you, is one which must be considered as having been made by you for the company which was afterwards formed at your invitation." LINDLEY, L. J., concurring, said there might be a case for rescission, if rescission were possible, but that rescission was not possible, because the property assigned by the company did not belong to it any longer. He added: "Then we are driven to consider the point which was really raised and decided in *Re Cape Breton Co.*—whether, rescission being impossible, the company can obtain from Palin an account of the profit which he made by the transactions which have been alluded to—and that depends really upon the evidence. But the evidence is not sufficient to enable them to succeed. It is not proved that when Palin bought—that is, on the 1st of February, 1873—he bought for the company which was ultimately formed, nor that when he bought the company was so far formed as to entitle it, or its members, to claim the benefit of the purchase, on any theory of trusteeship. Nor is it proved that persons were induced to take shares on the faith that the new company was buying from the old company. It is plain that the new company

did not in fact find the money which the vendors were paid. Under those circumstances, can we say that there was any such relation between Palin and the company as to entitle the company to say, 'you bought for us?' It appears to me that the evidence is not sufficient for that purpose. If it were, we could see our way to give relief." LOOPES, L. J., also concurring, said: "The question is, did Palin and his associates, on the 1st of February, stand in a fiduciary position towards this company that was thereafter to be formed? Or, in other words, were they then acting for the company about to be formed? If they were, the plaintiffs are entitled to succeed." This, he said, was entirely a question of evidence, and that in his view the evidence did not establish this conclusion. "They bought the mine themselves, and paid for it out of their own pockets. No person is called to say they were asked to take shares by any of these vendors because they were forming a company." He concludes: "No doubt, having regard to the secret profit that was made by these vendors, the company might have claimed rescission of the contract; but, in the circumstances, rescission had become impossible." The other cases may be more briefly stated. In *Gover's case*, *supra*, one Mappin agreed to buy a patent from Skoines for £65,000, payable partly in cash, and partly in shares of a company to be formed to use the invention. Mappin also engaged to use his best efforts to organize the company. Three months later, Mappin agreed with one Wright, who acted as trustee for the proposed company, to sell the patent to it for £125,000, payable in cash and shares, and it was also agreed that Mappin should be appointed managing director. The company was formed, and Mappin became a director. The suit was an application by Miss Gover, a subscriber pressed to pay "calls," to have her name removed from the company's register of members because of the failure to disclose the Mappin-Skoines contract in the prospectus. It was decided that the statute did not give a remedy against the company, but only against a delinquent promoter, and it held that Mappin was not a promoter when he made the contract. In *Erlanger v. Phosphate Co.*, *supra*, a leasehold interest in the island of Sombrero was purchased by a syndicate acting for themselves alone, and not as the representatives of any corporation existing or proposed. Soon afterwards they formed

a joint-stock company, and sold the lease to it for double the price paid by them. The contract of purchase by the corporation, at its instance, was set aside. In *Re Cape Breton Co.*, supra, the facts, briefly, were: One Fenn was the agent of a company to purchase a specific property, in which, before the commencement of his agency, he had acquired an interest. He did purchase it for the company, without disclosing to the company his interest in the property. After his purchase the facts were fully disclosed, and with the knowledge so acquired the company elected to retain the property. It was held the company could not recover, but the court said: "This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a small price was a purchase in behalf of the principal." In *Barr v. Railroad Co.*, 125 N. Y. 263, 277; 26 N. E. Rep. 145, it is sufficient to say that the principle laid down that a voidable contract remains good until rescinded, and that to rescind the property obtained under the contract must be returned.

Who and what are "promoters," so called, of corporations, and what their relations to the corporations which they help to form, has been more frequently judicially considered and determined by the English courts than by those of this country. Some English cases appear to be more in point, as applicable to the questions arising upon the record, than those cited by the defendant, to which we have just referred. A "promoter" has been defined to be a person who organizes a corporation. It is said to be not a legal but a business term, "usefully summing up, in a single word, a number of business operations familiar to the commercial world, by which a company is generally brought into existence." *BOWEN, J.*, in *Printing Co. v. Green*, 28 Wkly. Rep. (Q. B. Div. 1880) 351, 352. That such persons occupy a fiduciary relation toward the company or corporation whose organization they seek to promote is well settled by the decisions of both countries. Lord *COTTON* prefers to call them "trustees." *Bagnall v. Carlton*, 6 Ch. Div. 385. Sir George *JESSEL, M. R.*, in *Phosphate Co. v. Erlanger*, supra, said: "Promoters

stand in a fiduciary relation to that company which is their creature." In *Erlanger v. Phosphate Co.*, *supra*, the lord chancellor said of promoters: "They stand, in my opinion, undoubtedly, in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves (the promoters), it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive; that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint-stock company, and then sell his property to it; but I do say that if he does he is bound to take care that he sell it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." Lord O'HAGAN, referring to the same subject, expressed a similar opinion in even more emphatic language; declaring that while an original purchase might be legitimate, and not less so because the object of the purchaser was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction, yet "the privilege given them for promoting such a company for such an object involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future stockholders." The test, therefore, of the validity of such transactions, is that it must, in all its parts, be open and fair, so that the promoters shall not, in fact substantially "act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former." *Foss v. Harbottle*, 2 Hare, 461, 488; *McElhenny's Appeal*, 61 Penn. St. 188; *Simons v. Mining Co.*, 61 Penn. St. 202; *Oil Co. v.*

Densmore, 64 Penn. St. 43; Mining Co. v. Spooner, 74 Wis. 307; 42 N. W. Rep. 259; Land Co. v. Case, 104 Mo. 572; 16 S. W. Rep. 390; In re British Seamless Paper Box Co., 17 Ch. Div. 467; Sewage Co. v. Hartmont, 5 Ch. Div. 394. In the last case the distinctive feature was that the vendors paid the commission to the trustees who received the property on behalf of the company. They were compelled to pay it to the company. In Hitchens v. Congreve, 1 Russ. & M. 150 (on appeal, 4 Russ. 562), three promoters induced their company to buy a mine for £25,000, of which they received from the vendor, and divided among themselves, £15,000. This they were compelled to account for to the company. Similar cases are Beck v. Kantowicz, 3 Kay & J. 230; Printing Co. v. Green, *supra*; Mining Co. v. Grant, 11 Ch. Div. 918; Bagnall v. Carlton, *supra*; Kent v. Brickmaking Co., 17 Law T. (N. S.) 77; Water Co. v. Flash, 97 Cal. 610; 32 Pac. Rep. 600.

It is an undoubted rule of law that where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it. *Emery v. Parrott*, 107 Mass. 95. The same principle is applied against promoters of corporations, in case of any secret contract more favorable than that disclosed. *Mining Co. v. Spooner*, *supra*, and the very numerous cases therein cited, and an exhaustive note, by Mr. Freeman, to said case, 17 Am. St. Rep. 149, 167. See, also, as applied to directors: *Cook Stock, Stockh. & Corp. Law*, §§ 649, 650; *Railroad Co. v. Kelly*, 77 Ill. 426; *Wardell v. Railroad Co.*, 103 U. S. 651; *McGourkey v. Railway Co.*, 146 U. S. 536; 13 Sup. Ct. Rep. 170. A careful examination of the cases will, we think, disclose two grounds of the liability of defendants to corporations for undisclosed profits resulting from transactions with such corporations: First, where the defendants are corporate fiduciaries. The characteristic of this relation is trust, Such a relation undoubtedly exists between companies and their officers, such as directors. *Mallory v. Mallory-Wheeler Co.*, 61

Conn. 135; 23 Atl. Rep. 708. With reference to promoters, since a man cannot receive an appointment from a non-existent company, the proof may be less obvious; but it may, nevertheless, be shown conclusively by a variety of representations, admissions and acts. The second ground of liability is fraud. The law does not prohibit a promoter from dealing with his company, but he must make full disclosure to the company of his relations to the property that is the subject of his deal. Suppression, concealment or misrepresentation of material facts is fraud, upon proof of which rescission of contract or repayment of the secret profits will be compelled. A very recent English case, in which a secret arrangement between a promoter and a director of the company was considered, is that of *In re North Australian Territory Co. — Archer's case* — (1892) 1 Ch. 322. The facts in the case were these: Archer, being requested by the promoter of a projected company to become a director, agreed to do so upon the terms that if he should, at any time, desire to part with the shares he was to take in order to qualify him as director, the promoter should purchase them of him at the price he should pay for them. The company was subsequently formed, and Archer became a director, took the qualification shares and paid for them at par, out of his own money, and from time to time acted as director; but he never disclosed to his codirectors, or to the company, his agreement with the promoter. He afterwards resigned his office of director, and, subsequently to his resignation, the promoter, at his request, paid to him the sum which he had paid for the shares, and accepted a transfer of them. At that time the shares were valueless in the market. In the winding up of the company the liquidators asked that Archer be ordered to pay to them the sum received by him from the promoter, with interest; and it was held (reversing the lower court) that having regard to his position as director of, and, therefore, agent for, the company, whatever benefit or property accrued to him under the indemnity constituted by his secret agreements with the promoter belonged to the company, and that the retention by him of the proceeds of the indemnity occasioned a loss to the company, for which he was accountable, with interest, upon what was declared to be the principle of *Hay's case*, 10 Ch. App. 593, and *Pearson's case*, 5 Ch. Div. 336. During the argument the

counsel for the liquidators, in support of the appeal, were stopped by the court; and counsel for Archer, then proceeding, were submitted to some peculiar interruptions by the judges. FRY, L. J., asked: "Why should not Archer be accountable for the £500, as property of the company retained by him?" Counsel replied: "The real question is, did the company suffer loss by what was done? They never had the £500, and, therefore, cannot be said to have lost it. In the majority of cases in which a director has been held accountable to the company, he has, in effect, received money which originally came from the coffers of the company, as in Hay's case, and the cases already mentioned." BOWEN, L. J.: "Smith, being in a fiduciary relation to the company, had no right to give a director a benefit without the company knowing it. An indemnity against loss is a valuable consideration." Counsel said: "At the time the letter was written Archer had not taken the shares, and had not then agreed to become a director. Again, there is no evidence that the contract was not disclosed to the company." FRY, L. J., asked: "Would an honorable man assent, as Archer did, to accepting this indemnity, on the terms that he was to keep it secret? If it was not actually dishonest, it seems to me to be a very improper course of proceeding." BOWEN, L. J.: "Is it right that the wolf should give a sop to the watchdog without his master's leave?" This question appears to have practically "closed the debate." The opinions of the judges, separately declared, appear at considerable length in the report, and are so able and apposite that we regret that we cannot feel warranted in quoting from them.

Applying the principles recognized in the decisions to which we have referred to the case before us, it seems clear that the plaintiff in the principal case is entitled to recover. The finding is explicit that the original arrangement between Wilcox and Foley contemplated no acquisition of any interest in the patents by Wilcox, but the organization by Wilcox of a corporation, and the sale to it of such patents; then a division between Foley and Wilcox of the avails of such sales. The written contract between Wilcox and Foley was entered into for the purpose of carrying out said plan of organizing the company, selling the patent and dividing the avails. In the agreement itself, while it is stated, under a "whereas," that Wilcox is desirous of owning one-half

of said patents, yet the very writing discloses that the proper construction of this language is that the patents, as belonging to Foley, should be sold to a joint-stock corporation, to be organized by Wilcox, for twice the sum that Foley was willing to dispose of them for, namely, for the sum of \$3,000 in cash to be received from the company, and \$5,000 of the capital stock of the company, and that then Foley should give to "said Wilcox one-half of the three thousand dollars cash, as soon as received, and one-half of the five thousand dollars of the capital stock of the company, as he shall receive it." Such being the arrangement, it was, very appropriately, agreed that it should be kept secret. Wilcox, in soliciting subscriptions for stock, most scrupulously observed such obligation of secrecy, and also went further, and, "for the purpose of inducing persons to subscribe for said stock, stated to nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he (Wilcox) was putting his money into said enterprise upon precisely the same basis as the others of said subscribers, and it was with that understanding that nearly all of said persons subscribed for said stock." The corporation was organized, and Wilcox, at its first meeting, was present, and was elected temporary clerk and a director, and voted in favor of a resolution (which was adopted) which recited that Foley was the owner of certain letters patent, necessary and convenient for the purposes of the company, and which directed their purchase for certain stock and the sum of \$3,000 in cash. It will thus be seen that the transaction between Wilcox and Foley contemplated, and Wilcox, in its execution, both as promoter and director, used every possible species of bad faith, breach of trust and infidelity while occupying such a fiduciary relation. Placing the actual conduct of Wilcox side by side with the standard of conduct required of those in such positions, as declared by the judges in the Phosphate Co. case, *supra*, so much relied upon as authority by the defendant, the contrast is overpowering. Although many of the very numerous cases which we have cited, and almost numberless others to which reference might also be made, are direct authorities for the doctrine that, in such cases as that before us, a defendant may be compelled to account, though no offer of rescission is made, and the property may be worth as much or more than was paid for

it, and although the subject has already been incidentally referred to and considered, in certain aspects of it, in this opinion, yet, in view of certain language in some of the cases upon which the defendant relies, including *Mallory v. Mallory-Wheeler Co.*, supra; and *Tryon v. White & Corbin Co.*, 62 Conn. 171; 25 Atl. Rep. 712, it may be useful, further, to say that, properly understood, there is nothing in any of such cases cited by the defendant in conflict with the doctrine stated. Thus, in *Mallory v. Mallory-Wheeler Co.*, supra, the plaintiff sought to recover a sum as balance of salary claimed to be due him for services rendered as chief manager and director of the defendant's business. It was claimed that the contract under which such service was performed was void, or, if not void, that it was voidable at the option of the corporation. This court, treating it as a case in which a director had made use of a fiduciary relation to secure for himself an advantageous contract for a salary, held that, independent of the question of public policy, such transaction was voidable at the election of the corporation. The court then added: "It may fairly be gathered from the authorities cited that the rule we are now considering does not operate, ipso vire, to avoid every transaction of a trustee, made with his beneficiary, in which he is interested. It is generally limited in its operation to rendering it voidable at the election of the party whose interests are concerned in the question of its affirmance or disaffirmance. If, therefore, nothing was done in avoidance, the transaction remains. 2 Pom. Eq. Juris. § 1077; *Duncomb v. Railroad Co.*, 84 N. Y. 190, 198. Much more if the transaction has been ratified by that party. *Barr v. Railroad Co.*, 125 N. Y. 255; 26 N. E. Rep. 145." This court, in that case, was considering a transaction in which there was no concealment or secret profit, and nothing proved to have been done in actual, as distinguished from constructive, bad faith or fraud; and the plain distinction between such a case and the one under consideration, in reference to equitable relief, is clearly shown in the section referred to in *Pomeroy* (1077), and the very numerous authorities cited in the exhaustive note to that section, in the second edition. The same thing may be said in reference to other cases relied upon by the defendant; and we think the contention that a person who, first

as a promoter, then as a director, induces a corporation to embark its capital in a business, in such a way that the rescission of its purchase of property essential to the continual life of the company can only be made by the sacrifice of such existence, can retain his secret profits in the transaction, unless the contract shall be rescinded and the enterprise abandoned, is contrary to the doctrine of numerous cases, and without the intended sanction of any. Such a rule would permit retention of secret profits, and its enforcement would turn the courts into promoters, not of corporations, but of frauds upon them, numerous enough as they are, and needing no such promotion. "It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract, and demand back what has been received under it, or he may affirm the bargain, and sue and recover damages for the fraud." Cooley Torts, 589, 591, and cases cited in note 2. Thus, if, after discovering a shortage in goods, the price is paid, an action lies for the fraud, although the contract may not be disaffirmed. *Nauman v. Oberle*, 90 Mo. 666; 3 S. W. Rep. 380. So, also, in the case of wrong dealing by a trustee, the rule is, when the facts come to the knowledge of the cestui que trust, he may either affirm or repudiate the transaction, and if he does the former he may yet recover secret profits. Thus, where a partner sold his own goods to a partnership without the knowledge of his associates, he was held liable to account to them for the profits. *Bentley v. Craven*, 18 Beav. 75. See, also, *Kimber v. Barber*, 8 Ch. App. 56; *Getty v. Devlin*, 54 N. Y. 412. The same rule applies in the law of principal and agent, and of attorney and client; indeed, in every case where one improperly conducts himself to his own advantage while acting in any fiduciary capacity. The language, therefore, cited from *Mallory v. Mallory-Wheeler Co.*, and the statement in *Tryon v. White & Corbin Co.*, 62 Conn. 173; 25 Atl. Rep. 712, that "an acceptance of the benefits of the transaction imposes an obligation to assume its burdens," and the principles stated in other decisions relied upon by the defendant, have no legitimate application to cases where a corporation seeks to recover from a promoter or director money had and received, which, in equity and good conscience, belonged to the corporation. Instead of rescinding the transaction of purchase, the corporation, by its suit, affirms it, and enforces the real

contract, as made for its benefit, and not the pretended contract, as simulated, in order to defraud it. In such a case the corporation recognizes the obligation to assume the burdens, and only demands that it shall receive "the benefits of the transaction." Indeed, the principle of *Murray v. Jennings*, 42 Conn. 9, is decisive of this whole matter.

The defendant in the principal case further contends that the Yale Gas Stove Company does not appear in court with clean hands. It is said the finding shows that "the real bargain between Foley and the Yale Gas Stove Company fixed the price to be paid for his patents at \$3,000 in cash and \$5,000 in stock," but that, to avoid the joint-stock law, and to defraud the public, a sham contract was made; that thereafter a court of equity should leave them where they have placed themselves. "With what propriety," it is asked, "can the court decree that one party shall give up to the other an illegal profit, while permitting that other to keep an equally illegal profit obtained in the same transaction?" The maxim that "he who comes into equity must come with clean hands," has no such application as the defendant seeks to give it. It refers solely to willful misconduct in regard to the matter in litigation. Snell Eq. 35. Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement if the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong v. Bank*, 133 U. S. 433; 10 Sup. Ct. Rep. 450; *Lewis & Nelson's Appeal*, 67 Penn. St. 153, 166; *Woodward v. Woodward*, 41 N. J. Eq. 224; 4 Atl. Rep. 424; *Mining Co. v. Spooner*, supra.

Finally, the suit was properly brought by the corporation, instead of by its stockholders. The question arose in *Phosphate Co. v. Erlanger*, supra, and JAMES, L. J., said (5 Ch. Div. 122): "The company represent the contracts of yesterday as of to-day, as they will the contracts of to-morrow or the next day or next year. They represent the contracts which were made by the company. They are liable upon the contracts, and they have every right, in respect of those contracts, which an individual being would have if he had the like case, or was under the like liability. Therefore, I am of the opinion that the company not only can sue, but that the company was the only proper plaintiff that could sue upon the case made by this bill." See, also, 1

Morawetz Priv. Corp. § 546; 3 Pom. Eq. Jur. §§ 1094, 1096, and the numerous cases therein cited. Indeed, no contention upon this point was made.

In reference to the suit of Wilcox v. Foley, the contract between them was manifestly opposed to public policy, to good morals. It is illegal, and cannot be enforced. If any one has a cause of action against Foley, not upon the contract, but by reason of the transaction to which it led, it is the corporation, and not Wilcox.

The Superior Court is advised that judgment be rendered for the plaintiff in Yale Gas Stove Co. v. Wilcox, to recover \$3,000, with interest on \$500 of said sum from October 9, 1890, to the date of said judgment, and interest on the balance, of \$2,500, from December 1, 1890, with costs, and, in the case of Wilcox v. Foley, that judgment be rendered for the defendant. The other judges concurred.*

Promoters — liability to corporation for secret profits realized from sale of land to corporation. — Defendants, having a contract for land at five dollars an acre, employed agents to organize a corporation to purchase it at twenty-five dollars. It was represented to the subscribers for stock in such corporation that the contract held by defendants was for the purchase of the land at twenty-five dollars an acre, the lowest price at which it could be obtained; and it was concealed from them that one of defendants, a large subscriber to the corporation, was interested in the contract, and that the organizers were defendants' agents. The corporation gave a mortgage for part of the price, which was foreclosed, defendants buying in the land and obtaining a deficiency judgment. Held, in an action to set aside the foreclosure decree and the judgment, and to cancel the notes and mortgages, that the corporation was the proper plaintiff, rather than the individual subscribers to stock, and that the relief should be granted. *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610; 32 Pac. Rep. 600. The fact that defendants purchased the land before they put themselves in a position of trust towards the corporation by its organization did not prevent it from recovering the secret profits made by them. *Ibid.* The decree of foreclosure was rendered April fifth, the stockholders first obtained notice of the fraud June fifth, and the action was begun in December. Held, that, as defendants were in control of the corporation till the last of September, and the delay in beginning the action had not prejudiced defendants, plaintiff's right of action was not barred. *Ibid.*

The following are important cases on the liability of promoters in such cases: *Brewster v. Hatch*, (N. Y.) 3 Am. R. R. & Corp. Rep. 481; *South Joplin Land Co. v. Case*, (Mo.) 4 Am. R. R. & Corp. Rep. 391.

* Reported in 29 Atl. Rep. 303.

CINCINNATI COOPERAGE Co. v. BATE ET AL.

(Court of Appeals of Kentucky, May 8, 1894.)

CORPORATIONS. CHANGE OF NAME WITHOUT COMPLYING WITH LAW DESTROYS IDENTITY OF CORPORATION AND RENDERS STOCKHOLDERS LIABLE AS PARTNERS. The directors and stockholders of a corporation changed its name without complying with the formalities required by law in such case, and then continued the business under the new name. Held, that they were liable as copartners, the identity of the corporation being destroyed by the unauthorized change of name.

ACTION by the Cincinnati Cooperage Company against E. R. Bate and others on a draft. Defendants obtained judgment. Plaintiff appeals.

Fairleigh & Straus, for appellant. *James S. Pirtle*, for appellees.

HAZELRIGG, J. The conclusions of fact certified by the court below in this case are that: "The New Albany Brewing Company was a corporation duly created and organized under the laws of the state of Indiana for the purpose of manufacturing and vending beer. It was incorporated under the corporate name of the New Albany Brewing Company. Afterwards, the defendants, E. R. Bate, J. Gebhart and another, acquired the entire stock of the New Albany Brewing Company, and became its directors. Bate, Gebhart and another, as directors and stockholders, without taking any steps required by the law of Indiana in such cases provided, changed the name of the New Albany Brewing Company to the Gebhart & Bate Brewing Company, and thereafter the business of the New Albany Brewing Company was conducted under the name of the Gebhart & Bate Brewing Company, and the business under the latter name was conducted at the same place, and in its conduct was used the same property, appliances and machinery. The draft sued on was drawn and accepted after the change of name of said corporation as aforesaid, and whilst the defendant E. R. Bate was a holder and owner of stock, and a director of the corporation." The court found, as a matter of law, that Bate was not liable individually on the

draft, nor liable thereon as a partner. The contention of the appellant is that Bate and the other owners of the old concern, having abandoned the corporate name, and adopted a new name, which gave special prominence to the names of the individuals composing the concern, are individually liable as partners in a new venture, for the reason that no legal steps were taken to change the corporate name, as might have been done under the easy mode provided by the Indiana statute.

It is evident at the outstart that, if there are any adjudications in point by the Indiana courts, they must be given a controlling influence; and we are referred to the case of *Coleman v. Coleman*, 78 Ind. 344. The court says: "Waiving all consideration of the doctrine of estoppel contended for, and conceding that there was no corporate body for which the appellees were authorized to act, * * * still, if the company was not a corporate body, then it was a partnership composed not merely of the directors, but of all the subscribers to the articles of incorporation." That the Gebhart & Bate Brewing Company was a corporate body cannot be maintained, in the face of the record to the contrary. The parties assuming to do business as such company did not take a single step required by the statute for the purpose of creating a corporation, or of changing the name of the old corporation. The name of a corporation is "the very being of its constitution, the knot of its combination, without which it could not perform its corporate functions." *Smith Merc. Law* (3d ed.), 141. "When a corporation is created, a name must be given to it; and by that name alone must it sue and be sued and do all legal acts." 1 *Bl. Comm.* 474. "The law knows a corporation only by its corporate name." *Walk. Am. Law* (9th ed.), 232. "A corporation has no right or power, of itself, to change or alter the name originally selected by it, without recourse to such formal proceedings as are prescribed by law." *Beach Priv. Corp.* § 275. The effect of such change of name is an abandonment, not only of the corporate name, but the corporation itself. The identity of the creature authorized by the statute to do business is destroyed. It is in no sense like the case where an individual changes his name. The very being of its constitution is destroyed by an abandonment of its name, and an attempted substitution of a new name without authority of

law. In the case of *Fuller v. Rowe*, 57 N. Y. 26, it was said "that parties assuming to act in a corporate capacity, without a legal organization as a corporate body, are liable as partners to those with whom they contract." In *Robinson v. Harris*, 5 Ky. Law Rep. 928, it was held that the corporate existence of associations provided for in chapter 56, General Statutes, depends upon and begins only after the terms of the law are substantially complied with, and until the notice required by section 5 has been published the association has no right to begin business as a corporation; and because such notice had not been published, the vendors were held liable as individuals. We concur in the conclusion reached by the Superior Court in this case, that "the Gebhart & Bate Brewing Company had no right to do business as a corporation until the members had complied with the law. Until they did so, no corporation existed. The stockholders were merely doing business as partners, and as such are individually liable for the debts." Judgment reversed, and cause remanded for proceedings conformable to this opinion.*

THE CORPORATE NAME.

1. Misnomer of corporation in deeds and contracts.—A contract of any kind, to which a corporation is a party, is not invalidated by reason of the misnomer of the corporation therein, whether the promise is to or by the corporation, but such a contract may be enforced by or against the corporation in its true name, upon the averment and proof that the contract was made by or with the corporation by the name and style assumed in the contract. *Douglass v. Branch Bank at Mobile*, 19 Ala. 659; *People v. Love*, 19 Cal. 676; *Tervis v. Randall*, 6 Cal. 632; *Chadsey v. McCreery*, 27 Ill. 253; *President, etc., of Town of Ft. Wayne v. Jackson*, 7 Blackf. 36; *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180; 27 N. E. Rep. 318; *Kentucky Seminary v. Wallace*, 15 B. Mon. 35; *Hagerstown Turnpike Road v. Creger*, 5 H. & J. 122; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Taunton & So. Boston Turnpike v. Whiting*, 10 Mass. 327; *Goddard v. Pratt*, 16 Pick. 412; *Commercial Bank v. French*, 21 Pick. 486; *Melledge v. Boston Iron Co.*, 5 Cush. 158; *Franklin Ave. German Sav. Inst. v. Board of Education*, 75 Mo. 408; *Society for Propagating the Gospel v. Young*, 2 N. H. 310; *Newport Mechanics' Mfg. Co. v. Starbird*, 10 N. H. 123; *Inhabitants v. String*, 10 N. J. L. 323; *Hoboken Building Assn. v. Martin*, 13 N. J. L. 427; *Centenary Methodist Church v. Parker*, 40 N. J. Eq. 307; *Boisgerard v. New York Banking Co.*, 2 Sandf. Ch. 23; *New York Am. Soc. v. Varick*, 13 Johns. 38; *Mott v. Hicks*, 1 Cow. 513; *Brockway v. Allen*, 17 Wend. 40; *Hammond v. Shepard*, 29 How. Pr. 188; *Ryan v. Martin*, 91 N. C. 464; *Asheville Division No. 15 v.*

* Reported in 26 S. W. Rep. 538.

Aston, 92 N. C. 578; Milford, etc., Turnpike Co. v. Brush, 10 Ohio, 111; Berks & Dauphin Turnpike Road v. Meyers, 6 S. & R. 12; Culpepper Society v. Digges, 6 Rand. 165; Clement v. City of Lathrop, 18 Fed. Rep. 885; Mayor, etc., of Lynne Regis, 10 Coke Rep. 124.

In *Inhabitants v. String*, 10 N. J. L. 828, 824, it it said: "The misnomer of a corporation in a grant or obligation does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument be shown by proper and apt averments and proof." In *Clement v. City of Lathrop*, 18 Fed. Rep. 885, bonds were issued in the name of the "Town of Lathrop" by a corporation whose correct name was "The Inhabitants of the Town of Lathrop." In a suit on the bonds it was averred that the corporation was commonly known as the "Town of Lathrop," and that the bonds were issued by "The Inhabitants of the Town of Lathrop" in and by the name of the "Town of Lathrop." In holding that the bonds might be enforced the court said: "It has long been settled that it is not necessary in order that a corporation be bound by its contracts that they shall be made in its exact corporate name. If it appears from the allegations and proof that the obligation sued upon was intended to be the obligation of the corporation sued, a recovery will not be defeated by reason of a misnomer alone. * * * It is enough if the identity of the corporation is unmistakable, either from the face of the instrument or from the averments and proof."

In *Asheville Division No. 15 v. Aston*, 92 N. C. 578, a deed to "Asheville Division No. 15" was held to convey title to the plaintiff, whose true name was "Asheville Division No. 15 of the Sons of Temperance." It was said that it was evident the plaintiff was intended and that the omission of part of a corporate name in such a contract, not producing any uncertainty, was immaterial.

It is immaterial, according to the authorities, how wide the departure is from the true name, nor whether the name used in the contract bears any resemblance to the correct corporate name. In *Melledge v. Boston Iron Co.*, 5 Cush. 158, the plaintiff sued the defendant company upon notes signed "Horace Gray & Co.," averring that the defendant made the notes by that name. A recovery for the plaintiff was sustained, the court holding that a corporation might adopt the name of a mercantile firm in making contracts and bind itself by contracts in such name. In *Medway Cotton Manufactory v. Adams*, 10 Mass. 360, the plaintiff company sued on a note made by defendants and running to "Richardson, Metcalf & Co.," averring that the defendants promised the plaintiff by that name. The defendants demurred on the ground that the note showed a promise to a firm, and that the averment was absurd and repugnant to the note. But the court held otherwise, and ruled that it was competent to prove the averment, and that, if proved, it would establish the plaintiff's right to recover.

In *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180; 27 N. E. Rep. 318, appellee sued upon a guaranty, which was alleged to have been made to it in the name and style of "Nee-Ban." It was argued that appellee, being a corporation, could not contract in any but its true corporate name, and the contract sued upon, being made in an assumed or fictitious name, was

not enforceable. To this the court said: "In relation to the first proposition, there seems to have been no question in any of the transactions or proceedings concerning the identity of the appellee. It appears to have been as well known by its popular name as by its true name, as it transacted business and advertised largely in the assumed name. While it is true that every corporation must adopt a name and should transact business in the name of its adoption, this requirement of the law was designed for the purpose of identification chiefly, and a contract by a corporation in a name different from its true corporate name may be enforced by either party when no question is raised disputing the identity of the corporation. The rules of law relating to the names of corporations are the same as those applicable to individuals."

Some cases indicate that it must appear from the face of the contract what corporation was intended. Thus in *Douglass v. Branch Bank at Mobile*, 19 Ala. 659, it is said that "if it be apparent upon the face of the deed that the corporation was intended thereby, either to take or to grant, a mistake in the true name will not vitiate the instrument." And in *Hagerstown Turnpike Road v. Creeger*, 5 H. & J. (Md.) 122, the court says: "A distinction is to be found in all the authorities between actions by corporations and contracts, leases, bonds and grants made by or to them. In regard to the first great strictness is observed, whereas much indulgence is shown to support the latter; and the reason assigned is that in actions the consequences of a misnomer are easily repaired, while a mistake in the name in grants, etc., would be fatal, and the benefit of them would be wholly lost. With this distinction in view, the court think that this rule may be laid down as to mistakes made in the name of corporations, that if there is enough said in their contracts, leases, bonds and grants to show that there is such a body politic, and to distinguish it from others, the corporation is well named." But in these cases the court did not need to go further, and they cannot be considered as necessarily in conflict with those adopting a more liberal rule.

Where the difference between the true name and the name used in the contract is slight, it may be disregarded as immaterial. In such case it may be declared upon as a contract made by or with the corporation without any covenant that it was made by or with it in and by the name employed in the contract. If there is a mere omission or transposition of words which do not affect the sense or leave any doubt as to the intent, the contract will not constitute a variance from the pleading. Instances of such immaterial variances are the following: "*Rock Island & Alton Railroad Co.*" for the "*Alton & Rock Island Railroad Co.*" *Chadsey v. McCreery*, 27 Ill. 258. "*New York Central College*" for "*New York Central College Association.*" *Hammond v. Shepard*, 29 How. Pr. 188. "*The President, Directors and Company of the Newport Mechanics' Mfg. Co.*" instead of "*Newport Mechanics' Mfg. Co.*" *Newport Mechanics' Mfg. Co. v. Starbird*, 10 N. H. 128; *Milford, etc., Turnpike Co. v. Brush*, 10 Ohio, 111. "*Berks and Dauphin Turnpike Road*" instead of "*The President, Managers and Company of the Berks and Dauphin Turnpike Road.*" 6 S. & R. 12.

But the only safe way is to aver that the contract was made by or with the corporation by the name and style used in the contract. Any danger of variance will then be avoided. *President, etc., of the Town of Ft. Wayne v. Jackson*, 7 Blackf. 86.

2. Misnomer of corporation in devises and bequests in wills.—The same principles apply in general to wills as to contracts, as respects the subject of misnomer. In *Lefevre v. Lefevre*, 59 N. Y. 434, 440, ALLEN, J., says: "A misnomer or misdescription of a legatee or devisee, whether a natural person or corporation, will not invalidate the provision or defeat the intention of the testator, if, either from the will itself or evidence dehors the will, the object of the testator's bounty can be ascertained. No principle is better settled than that parol evidence is admissible to remove latent ambiguities, and when there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator. A corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will, may, in all cases, be proved by parol." Numerous cases may be cited in support of these views. *Cromie's Heirs v. Louisville Orphan Home*, 8 Bush, 865; *Preachers' Aid Soc. v. Rich*, 45 Maine, 552; *First Parish in Sutton v. Cole*, 3 Pick. 282; *Minot v. Boston Asylum & Farm School*, 7 Met. 416; *Tucker v. Seaman's Aid Soc.*, 7 Met. 188; *Chapin v. School District No. 2*, 85 N. H. 445; *New York Institution for the Blind v. How's Exrs.*, 10 N. Y. 84; *President, etc., of Deaf & Dumb Institute v. Norwood*, Busbee Eq. (N. C.) 65; *Button v. Am. Tract Soc.*, 23 Vt. 386; *Attorney-General v. Mayor, etc., of Rye*, 7 Taunt. 547; *Doe v. Miller*, 1 Barn. & Ald. 699; *In re Briscoe's Trustees*, 20 Wkly. Rep. 855.

A bequest to the "Deaf and Dumb Institution" was held good to the "President and Directors of the North Carolina Institute for the Education of the Deaf and Dumb." *Deaf & Dumb Institution v. Norwood*, Busbee Eq. (N. C.) 65. It appeared that the institution was known and called by the former name. So a bequest to the "Boys' Asylum and Farm School" was held good to the "Boston Asylum and Farm School for Indigent Boys." *Minot v. Boston Asylum & Farm School*, 7 Met. 416. In *Lefevre v. Lefevre*, 59 N. Y. 434, a devise to the "Home of the Friendless in New York" was held to be a good devise to the "American Female Guardian Society," it appearing that the latter institution commonly used, and was known by, the names, "Home for the Friendless," or "Home of the Friendless," but it was held that, under a statute, the devisee could not take because the will was made within two months of the death of the testator. Other illustrations will be found in the cases cited.

A more difficult question is presented when the name or description used by the testator might apply to two or more corporations. But in such cases the doubt can generally be resolved by extrinsic evidence. In *Button v. American Tract Soc.*, 23 Vt. 386, the devise was to "The American Home Mission Tract Society for our Western Mission." The benefit was claimed by the "American Tract Society" and also by the "American Home Missionary Society." Evidence was given to show the testator's knowledge of, and con-

nection with, the work of the former, and the legacy was adjudged to it. In *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191, the bequest was to "The Society for the Relief of Indigent Aged Females." The legacy was claimed by "St. Luke's Home for Indigent Christian Females," and by "An Association for the Relief of Respectable Aged Indigent Females." It was adjudged to the latter on the face of the will and the charters of the two organizations. See, also, in the same line: *Cromie's Executors v. Louisville Orphan Asylum*, 8 Bush, 365; *Tucker v. Seaman's Aid Soc.*, 7 Met. 188; *In re Briscoe's Trustees*, 20 Wkly. Rep. 355.

It is said that where there are two corporations, neither of which precisely answers the description of the will, and both answering equally well, and it cannot be determined by extrinsic evidence that the testator meant the one rather than the other, the legacy will fail in this country, though it would be equally divided in England. *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191, 193.

3. Misnomer of a corporation plaintiff.—The rule seems to be well established that where a corporation sues by a wrong name the defect can only be taken advantage of by plea in abatement. *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30; *Pape v. Capital Bank*, 20 Kans. 440; *Bank of the Metropolis v. Orme*, 3 Md. 448; *Proprietors of Sunapee v. Eastman*, 32 N. H. 470; *Bank of Utica v. Smalley*, 2 Cow. 770; *Gray v. Monongahela Nav. Co.*, 3 W. & S. 156; *King v. Ilwaco Ry. & Nav. Co.*, 1 Wash. 127; 23 Pac. Rep. 924; *Mayor, etc., of Stafford v. Bolton*, 1 Bos. & Pul. 40; *Lehman v. Warner*, 61 Ala. 455; 6 Am. Corp. Cas. 155; *Smith v. Tallassee Branch, etc.*, 30 Ala. 650. To a plea of misnomer it is a good replication that at the commencement of the suit the plaintiff was known as well by the name by which he sues as by that set forth as the true name in the plea, and this rule is said to apply as well to corporations as to individuals. *Proprietors of Sunapee v. Eastman*, 32 N. H. 470.

A mistake in the plaintiff's name may be cured by amendment. *Smith v. Tallassee Branch of Central Plank Road*, 30 Ala. 650. In *Pape v. Capitol Bank*, 20 Kans. 440, such an amendment was allowed in the Supreme Court.

When it is necessary to prove the incorporation of the plaintiff, and this is done by documentary evidence, it may be necessary to prove identity between the corporation named in the documents and the corporation named in the pleadings. It is manifest such identity must appear either from the pleadings and documents themselves or from extrinsic evidence, or there will be a fatal variance. *King v. Ilwaco Ry. & Nav. Co.*, 1 Wash. 127; 23 Pac. Rep. 924. Slight variations, however, will be disregarded as immaterial. Thus, where the name of plaintiff was "The Capitol Bank of Topeka," and the name in the certificate of incorporation was "The Capitol Bank," but the certificate showed it was located at Topeka. *Pape v. Capitol Bank*, 20 Kans. 440. Very similar are *Washington County Nat. Bank v. Lee*, 112 Mass. 521; *Thatcher v. West River Nat. Bank*, 19 Mich. 196. So, where the name used in pleading was "President and Directors of the Bank of Utica," and the true name proved was the "President, Directors and Company of the Bank of Utica." *Bank of Utica v. Smalley*, 2 Cow. 770.

In *Trustees v. Tryon*, 1 Denio, 451, the plaintiff sued in the name of "The

Methodist Episcopal Church in the Village of Little Falls." There was a plea of nul tiel corporation, to which the plaintiff replied setting forth in detail the incorporation of a religious society by the name of "The Trustees of the Society of the Methodist Episcopal Church in the Village of Little Falls," and averring that the plaintiff and the corporation so created were one and the same. This was held a good replication.

In *President, etc., of Village of Romeo v. Chapman*, 2 Mich. 179, a suit for a penalty was defeated because brought in the wrong name. The charter apparently gave two corporate names for different purposes.

4. Misnomer of a corporation defendant.—Where a corporation defendant is sued by a wrong name, advantage must be taken of the misnomer by plea in abatement, or it will be waived. *Hoereth v. Franklin Mill Co.*, 30 Ill. 151, 157; *Talbot v. Hale*, 72 Ind. 1; *Wilson v. Baker*, 52 Iowa, 423; *School District No. 14 v. Griner*, 8 Kans. 224; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293; *Morris v. St. Paul, etc., R. Co.* 19 Minn. 528; *Ala. & V. R. Co. v. Bolding*, 69 Miss. 255; 13 South. Rep. 844; *State v. Bell Telephone Co.*, 36 Ohio St. 296; *Louisville, etc., R. Co. v. Reidmond*, 11 Lea, 205; *Stone v. Congregational Society*, 14 Vt. 86; *Lafayette Ins. Co. v. French*, 18 How. 404; *Bate Refrigerating Co. v. Gillett*, 31 Fed. Rep. 809; *Virginia & Md. Steam Nav. Co. v. United States, Taney*, 418. In *Ala. & V. R. Co. v. Bolding*, 69 Miss. 255; 13 South. Rep. 844, it is said: "There are cases which hold that one sued and served by a wrong name may disregard the summons. All agree that one summoned by a name not his own, and who appears and does not plead misnomer, waives it, and is bound by the judgment in the wrong name. There is no sound reason for a distinction in the two classes of cases. The true view is that one summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, not availing of his opportunity to appear and object, whereby the true name would be inserted in the proceedings (Code, § 1581), should be precluded from afterwards objecting. Having remained silent when he might and should have spoken, he must ever afterwards be silent as to this matter. This view is sustained by the books. 1 Black Judgm. § 218; *Freeman Judgm.*; *Welsh v. Kilpatrick*, 30 Cal. 202; *Insurance Co. v. French*, 18 How. 404; *Bank v. Jaggers*, 31 Md. 38; *Hoffield v. Board of Education*, 33 Kans. 644; 7 Pac. Rep. 216; *Waldorf v. Leonard*, 22 S. C. 118; *Smith v. Banker*, 1 Mass. 76; *Manufactory v. Adams*, 10 Mass. 360; *Guinard v. Heysinger*, 15 Ill. 288; *Parry v. Woodson*, 33 Mo. 347; *Waterbury v. Mather*, 16 Wend. 611; *Smith v. Patten*, 6 Taunt. 115. There is no distinction in this respect between natural persons and corporations. When a mandamus is served on the authorized agent of a corporation, it is served on the corporation. He is the corporation for this purpose, and it is because of this that a judgment by default may be rendered at the return term against the corporation on whose agent summons is personally served, as we hold may be done. The case, *Insurance Co. v. French*, 18 How. 404, cited above, is, besides sustaining our view as to the misnomer, a decision directly in point as to the effect of service on an agent of a corporation. It binds the corporation just as if the service was on one designated by the charter to receive it, or authorized to do so by its power of attorney. It must be so, for process can

be served on a corporation in no other way than by service on some officer or agent qualified by law for that purpose, and, for the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer."

In New Hampshire a distinction appears to be made between a material and immaterial departure from the true corporate name. In the former case it is said that the suit cannot be regarded as against the corporation, while in the latter case it is a mere misnomer, to be taken advantage of only by plea in abatement. *Burnham v. Savings Bank*, 5 N. H. 446; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309. In the first of these cases the court says: "And where a corporation is sued, if the name of the corporation is mistaken materially and substantially, the corporation cannot be affected by the proceedings. There is, in these cases, a distinction made between a variance in words and syllables only, and a variance in substance. If a corporation be sued by a name varying only in words and syllables, and not in substance, from the true name, the misnomer must be pleaded in abatement, otherwise it will not be regarded. But if the name be mistaken in substance, the suit cannot be regarded as against the corporation. This seems to us to be the law established by adjudged cases."

Where there is service on the proper party the misnomer may be cured by amendment. *Bullard v. Nantucket Bank*, 5 Mass. 99; *Sherman v. Proprietors of Conn. Riv. Bridge*, 11 Mass. 338; *Lane v. Seaboard & Roanoke R. R. Co.*, 5 Jones L. 25; *Burnham v. Savings Bank*, 5 N. H. 573; *Corporation of Georgetown*, 1 Cranch C. C. 234. But the writ and pleadings cannot be amended so as to make the proceedings effectual against a party that does not appear to have been served. *Brown v. Terre Haute & I. R. Co.*, 72 Mo. 567; 8 Am. Corp. Cas. 270. In the latter case the petition was against the "Terre Haute and Indianapolis and St. Louis Railroad Company." The summons purported to have been served upon the general manager of the same. Afterwards, there was an amended petition filed, identical with the first, except the name of the defendant, which appeared as the "Terre Haute and Indianapolis Railroad Company." There was a trial and judgment, but the judgment was entered against the defendant by the name in the first petition. Subsequently the plaintiff moved for a judgment against the Terre Haute and Indianapolis Railroad Company. It was held that the motion was properly denied, since there was no service upon the latter company, and a judgment against it would be a nullity. This case is obscurely reported. It does not appear whether there were, in fact, two corporations, nor whether the corporation intended to be sued was served with process.

In *Morris v. St. Paul & Chicago R. Co.*, 19 Minn. 528, it appeared that the St. Paul and Pacific Railroad Company had a branch named and called the St. Paul and Chicago Railroad Company, but there was no separate corporation. The plaintiff's cause of action was against the St. Paul and Pacific Railroad Company, but the latter company was not served. There was an appearance and answer purporting to be by the St. Paul and Chicago Railroad Company. It was held that the suit could not be maintained, but it was said that if the St. Paul and Pacific Railroad Company had been served, the mistake in name could have been treated as a misnomer to be taken advantage of only by plea in abatement.

The use of the terms "railroad" and "railway" in the name of a railroad are regarded as virtually synonymous and the use of one for the other is immaterial. *G., H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162; *Ala. & V. R. Co. v. Bolding*, 69 Miss. 255; 13 South. Rep. 844.

5. **Misnomer in ex parte and special proceedings by corporation.**—In *Glass v. Tipton, etc., Turnpike Co.*, 32 Ind. 376, the "Tipton, Petersburg & Berlin Turnpike Company" filed a petition and obtained an assessment of benefits in the name of the "Tipton, Petersburg & Berlin Gravel Road Company," and it was held that the assessment was void on account of the misnomer. It was said that "when a corporation is required by statute to act for its own benefit it must do this act in its proper name."

6. **Misnomer of corporation in tax levy.**—In *Souhegan Nail, Cotton & Woolen Factory v. McConihe*, 7 N. H. 300, a tax levied against the plaintiff by the name of the "Souhegan Nail, Cotton & Woolen Corporation," was held valid.

7. **Misnomer in statutes.**—A corporation is sometimes misnamed in an act of the legislature. In such cases the same rule would doubtless apply as in case of misnomer in wills. If it can be ascertained what corporation was intended the act will have effect, as though the true name had been used. *Cotton v. Miss. & Rum. Riv. Boom Co.*, 23 Minn. 372; *County Court v. Griswold*, 58 Mo. 175.

8. **Effect of judgment in favor of or against a corporation by a wrong name.**—From the rule laid down by the authorities cited in sections 3 and 4, that the misnomer of a corporation, plaintiff or defendant, can only be taken advantage of by plea in abatement, it follows that a judgment in favor of or against a corporation by a wrong name is valid and enforceable, and so are the authorities. Cases where the plaintiff was misnamed: *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30; *Gray v. Monongahela Nav. Co.*, 2 W. & S. 156; *Lehman v. Warner*, 61 Ala. 455; 6 Am. Corp. Cas. 155. Cases where the defendant was misnamed: *Talbott v. Hale*, 72 Ind. 1; *Wilson v. Baker*, 52 Iowa, 423; *Ala. & V. R. Co. v. Bolding*, 69 Miss. 255; 13 South. Rep. 844; *Alexander v. Berney*, 28 N. J. Eq. 90; *Lafayette Ins. Co. v. French*, 18 How. 404; *Va. & Md. Steam Nav. Co. v. United States*, Taney, 418; *Bate Refrigerating Co. v. Gillett*, 31 Fed. Rep. 809.

Where the declaration and summons were against the A. & V. "Railroad" Co., and the summons was served on the authorized agent of the A. & V. "Railway" Co., and a judgment by default taken against the A. & V. "Railroad" Co., execution may issue against the property of the A. & V. "Railway" Co., as the company, by failing to appear, waived the misnomer just as much as if it had appeared and failed to plead it. *Ala. & V. R. Co. v. Bolding*, 69 Miss. 255; 13 South. Rep. 844. In *Talbott v. Hale*, 72 Ind. 1, it was held that under a judgment against the Cincinnati, Peru & Chicago "Railway" Company, execution might issue against the Cincinnati, Peru & Chicago "Railroad" Company, and that in a suit for possession by the purchaser at execution sale it might be shown that both names applied to the same corporation.

If it becomes necessary to sue upon a judgment in favor of or against a corporation by a wrong name, the suit should be by or against the corporation by

its true name with an averment of identity with the corporation named in the judgment. *Lafayette Ins. Co. v. French*, 18 How. 404; *Lehman v. Warner*, 61 Ala. 455; 6 Am. Corp. Cas. 155.

9. **Variance between allegation and proof of corporate name.**—The name of a corporation as alleged and as proved need not be identical in order to avoid a variance. Words may be transposed, added or omitted, or syllables changed, and yet the name remain the same in substance. If the name alleged and the name proved are so far alike that it cannot reasonably be supposed that they refer to different corporations, then they may be regarded as the same in substance and as not amounting to a variance. *Smith v. Tallassee Branch*, 30 Ala. 650; *People v. Love*, 19 Cal. 676; *Chadsey v. McCreery*, 27 Ill. 253; *Talbott v. Hale*, 72 Ind. 1; *Pape v. Capital Bank*, 20 Kans. 440; *Hagerstown Turnpike Road v. Creeger*, 5 H. & J. (Md.) 122; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Washington County Nat. Bank v. Lee*, 112 Mass. 521; *Thatcher v. West Riv. Nat. Bank*, 19 Mich. 196; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309; *Newport Mechanics' Mfg. Co. v. Starbird*, 10 N. H. 123; *Bank of Utica v. Smalley*, 2 Cow. 770; *Hammond v. Shepard*, 29 How. Pr. 188, 191; *Asheville Division No. 15 v. Aston*, 92 N. C. 578; *Milford, etc., Turnpike Co. v. Brush*, 10 Ohio, 111; *Berks & Dauphin Turnpike Road v. Myers*, 6 S. & R. 12; *G., H. & S. A. Ry. Co. v. Donahoe*, 56 Tex. 162; *Culpepper Society v. Digges*, 6 Rand. 165; *Mayor, etc., of Stafford v. Bolton*, 1 Bos. & Pul. 40.

The words "railroad" and "railway" in the name of a railroad corporation may be regarded as synonymous and the use of one for the other will be regarded as immaterial. *Talbott v. Hale*, 72 Ind. 1; *G., H. & S. A. Ry. Co. v. Donahoe*, 56 Tex. 162; *Ala. & V. R. Co. v. Bolding*, 69 Miss. 255; 13 South. Rep. 844. In the old method of naming corporations the words "president, directors and company of," or "president, managers and company of," or some of them, were usually prefixed to the more distinctive part of the name. It has usually been held that a deviation consisting in the omission, addition or transposition of some or all of these words did not constitute a variance. *Smith v. Tallassee Branch*, 30 Ala. 650; *Hagerstown Turnpike Road v. Creeger*, 5 H. & J. (Md.) 122; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Newport Mechanics' Mfg. Co. v. Starbird*, 10 N. H. 123; *Bank of Utica v. Smalley*, 2 Cow. 770; *Milford, etc., Turnpike Co. v. Brush*, 10 Ohio 111; *Berks & Dauphin Turnpike Road v. Myers*, 6 S. & R. 12. But see *Burnham v. Savings Bank*, 5 N. H. 446. So the addition or omission of the name of the place where the corporation is located is usually not regarded as material. *People v. Capitol Bank*, 20 Kans. 440; *Washington County Nat. Bank v. Lee*, 112 Mass. 521; *Thatcher v. West Riv. Nat. Bank*, 19 Mich. 196; *Mayor, etc., of Stafford v. Bolton*, 1 Bos. & Pul. 40. So, it has been held that there is no material variance between "New York Central College" and "New York Central College Association," *Harman v. Shepard*, 29 How. Pr. 188, 191; between the "Rock Island & Alton Railroad Company" and the "Alton & Rock Island Railroad Company," *Chadsey v. McCreery*, 27 Ill. 253; between "The State of California" and "The People of the State of California," *People v. Love*, 19 Cal. 676.

Where the name of a corporation was laid in an indictment as "The Mer-

chants' Loan & Trust Company," and the proof showed that the legal name was "The Merchants' Savings, Loan & Trust Company," the variance was held fatal. *Sykes v. People*, 132 Ill. 32; 23 N. E. Rep. 391. In this case there had been an attempt to change the name of the bank by dropping the word "savings" and the proceedings had been in accordance with the law, but the law was held void as applied to banks. The corporation had been known and had done business by the new name. To the same effect is *McGary v. People*, 45 N. Y. 153. This was an indictment for arson and the building fired was alleged to have belonged to the "Phoenix Mills Company." The proof showed that it belonged to "The Phoenix Mills of Seneca Falls." The variance was held fatal.

10. When no name conferred by charter—necessity of name.—Where a corporation is created and no name is given to it, it may acquire a name by usage and may sue and be sued by such name. *South School District v. Blakeslee*, 13 Conn. 227; *West India Co. v. Van Moses*, 1 Strange, 612; *Anonymous case*, 3 Salk. 102; *Smith v. Plank Road Co.*, 30 Ala. 650; *Johnson v. City of Indianapolis*, 16 Ind. 227; *Sykes v. People*, 132 Ill. 32; 23 N. E. Rep. 391. Where a municipal corporation was created, without being named, but the powers were conferred upon the "Intendant and Wardens of the Town Council of Yorkville," it was held that it could be sued by that designation, as a name. *Neely v. Yorkville*, 10 S. C. 141. In Bacon's Abridgment it is said: "The names of corporations are given of necessity; for the name is, as it were, the very being of the constitution; for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is nobody to plead and be impleaded; to take and give, until it hath gotten a name." 2 Bac. Abr. chap. 1, tit. "Corporations." Quoted and approved in *Sykes v. People*, 132 Ill. 32; 23 N. E. Rep. 391, 393.

11. Corporations can have but one legal name, but may be known and may act by several.—It is a truism to say that a corporation can have but one legal name, the name which has been given it by the legislature, or which has been assumed in pursuance of law. See *Sykes v. People*, 132 Ill. 32; 23 N. E. Rep. 371. But a corporation may be known by a name other than its legal name, and may act and contract by such other name. *Cahill v. Bigger*, 8 B. Monr. 211; *Minot v. Curtis*, 7 Mass. 441; *Melledge v. Boston Iron Co.*, 5 Cush. 153; *Gifford v. Rockett*, 121 Mass. 431; *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180; 27 N. E. Rep. 318; *Alexander v. Berney*, 28 N. J. Eq. 90; *Clement v. City of Lathrop*, 18 Fed. Rep. 885. In the last case it is said: "A corporation, like a natural person, may be known and designated by several names, although it can have but one corporate designation." And see the cases already referred to above under the head of misnomer. But no case has held that a corporation may acquire by usage the right to a name other than its legal name, in such sense as to make the acquired name also a legal name, or so as to be able to insist upon the right to use such other name in legal proceedings. A corporation may contract and be contracted with by a name other than its legal name, and such contracts may be enforced by or against it. It may sue and be sued by a name other than its legal name, and, if no plea in abatement is filed, the suit may proceed to judg-

ment and the judgment will be valid. The test of the legality of a name would be the right to maintain a suit by or against the corporation by that name in the face of a plea in abatement. We believe no case has held that this could be done with respect to any but the legal name, although one case has intimated that it would be a good answer to a plea in abatement to show that the corporation was as well known by the name used in the suit as by the name given in the plea in abatement. Proprietors of Sunapee v. Eastman, 32 N. H. 470. But if this was true then a corporation could change its name without authority of law, which all the authorities agree cannot be done. See next section. In Sykes v. People, 132 Ill. 32; 23 N. E. Rep. 391, it is said: "We are referred to no case, and have been able to find none, where it is held that a corporation, having a corporate name given to it by its charter, can at the same time have a different corporate name by usage or prescription. It is true that to sustain grants to or by corporations some latitude is permitted in the use of their names, it being usually sufficient to use the name in substance, though not the same in exact words and syllables. To sustain a devise to a corporation it has been held sufficient if the words used show that the testator could only mean a particular corporation, though the name be entirely mistaken. So, when a corporation conveys by a wrong name, it will not be permitted to avail itself of its own wrong after receiving the full consideration for the conveyance. But where it is necessary to make use of the name of the corporation in judicial proceedings the rule is much more strict." And to the same effect is the case of McGary v. People, 45 N. Y. 153, 159, 160, where it is said: "A corporation cannot, except as authorized by law, change its own name either directly or by user. It cannot do such an act for itself. Neither can the public give it a name other than that of its creation; that is, a name by which it can be recognized in judicial proceedings. A corporation may, very likely, so adopt a name, in the transaction of its business, as to be made liable in its true name upon transactions in its assumed name; but it must then be sued by its true name. A distinction may exist between an ancient corporation, one existing by prescription, and a modern corporation, one created by charter. It is possible that the former may have a special name by user; but in this state we have no corporations save those created by law, and a corporation created within memory can regularly have but one name, and in all legal proceedings the true name of the corporation must be used."

12. **Effect of assuming a name not authorized by law, or of an attempt to change name without complying with the law.**—In the principal case the officers and stockholders of the "New Albany Brewing Company," without any attempt to comply with the law in that regard, changed the name of the corporation to "Gebhart & Bate Brewing Company," and thereafter conducted its business in the new name. It was held that this amounted to an abandonment of the corporation; that the corporation ceased to exist, and that the stockholders were liable as partners. No similar case appears to have arisen. The question is of great importance, and the rule laid down, if correct, would apply not only where there was a change of name without any attempt to comply with the law in that behalf, but also where

there was an ineffectual attempt to comply with the law. Thus in the case involved in *Sykes v. People*, 132 Ill. 32; 23 N. E. Rep. 391, a large and flourishing banking institution of Chicago undertook to change its name in the manner prescribed by law, and did business for years under the new name. Sykes was indicted and convicted of defrauding the bank. In the indictment the bank was referred to by its new name. On the trial the charter and proceedings to change the name were offered in evidence, and the latter were objected to on the ground that the act under which the change was made was invalid as applied to banks. The Supreme Court sustained this view, and granted a new trial because of the variance. Now, if the principal case is good law, the bank in question had ceased to exist and the stockholders were doing business as partners. And such would be the case whenever an attempt was made to change the name according to law and the proceedings were so defective as to be void.

In *O'Donnell v. C. R. Johns & Co.*, 76 Tex. 36; 13 S. W. Rep. 376, one of the original plaintiffs was "C. R. Johns & Sons," a corporation. Pending the suit there was an attempt to change the name of the corporation to "C. R. Johns & Co." This change was duly suggested in the case and the suit ordered to proceed in the new name. The defendant pleaded that the change of name was void, because of certain defects set forth, and, proof being made of the matters set up in the plea, asked the court to rule, in substance, that there was no such corporation as C. R. Johns & Sons or C. R. Johns & Co., and that the suit could not be maintained. But the court refused to so rule, and this was held correct. The Supreme Court says: "If the attempted change of name was unlawful, it would still be a lawful corporation by the name by which it brought this suit. An attempt to change the corporate name in a manner not authorized by law cannot be held to have had the effect given it by the charge asked and refused, but would rather leave the corporation as expressed in the general terms of the charge given by the court." *King v. Ilwaco Ry. & Nav. Co.*, 1 Wash. 127; 23 Pac. Rep. 924, tends to support the same view.

13. Power to change name.—A corporation cannot change its name unless authorized to do so by law, and then only in the manner pointed out by statute. *Queen v. Registrar*, 10 Q. B. (N. S.) 839; 59 E. C. L. R. 838; *Sykes v. People*, 132 Ill. 32; 23 N. E. Rep. 391; *McGary v. People*, 45 N. Y. 153; *Cincinnati Cooperage Co. v. Bate*, ante. In the case first cited it is said: "After a company has been completely registered, without defect or omission, so as to be incorporated by the name set forth in the deed of settlement, such incorporated company has not the power to change its name."

14. Effect of change of name by legislature or in pursuance of law.—A change of the name of a corporation by an act of the legislature, or in the manner provided by law, does not destroy its identity or affect its rights and liabilities. *Ready v. Tuskaloosa*, 6 Ala. 327; *Madison College v. Burke*, 6 Ala. 494; *State v. Mobile*, 24 Ala. 706; *Trustees of University v. Moody*, 60 Ala. 389; *West v. Carolina Life Ins. Co.*, 31 Ark. 476; *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30; *City of Olney v. Harvey*, 50 Ill. 453; *Town of Reading v. Wedder*, 66 Ill. 80; *Rosenthal v. Madison, etc., Plank Road Co.*, 10 Ind. 358; *Hazlett v. Butler University*, 84 Ind. 230; *Trustees of North*

Western College v. Schwagler, 37 Iowa, 577; **Cahill v. Bigger**, 8 B. Mon. 211; **Thomas v. Visitors of Frederick County School**, 7 G. & I. 369; **Bucksport & Bangor R. Co. v. Buck**, 68 Maine, 81; 7 Am. Corp. Cas. 318; **Dean v. La Mott Land Co.**, 59 Mo. 523; **Alexander v. Berney**, 28 N. J. Eq. 90; **Gray v. Monongahela Nav. Co.**, 2 W. & S. 156; **Wesley v. Shenandoah, etc., Co.**, 83 Va. 768; **Girard v. Philadelphia**, 7 Wall. 1; **Cochester v. Seaber**, 3 Burr. 1865. After such change of name, suits by and against the corporation should be in the new name, and if upon contracts made in the old name, there should be appropriate averments showing the identity of the corporation under the different names. **Ready v. Tuscaloosa**, 6 Ala. 327; **Madison College v. Burke**, 6 Ala. 494; **West v. Carolina Life Ins. Co.**, 31 Ark. 476; **Hazlett v. Butler University**, 84 Ind. 230; **Trustees of North Western College v. Schwagler**, 37 Iowa, 577; **Bucksport & Bangor R. Co. v. Bucksport**, 68 Maine, 81; 7 Am. Corp. Cas. 318. But the use of the old name will amount only to a misnomer, which must be availed of, if at all, by plea in abatement. **Alexander v. Berney**, 28 N. J. Eq. 90; **Gray v. Monongahela Nav. Co.**, 2 W. & S. 156. When the name is changed pending suit, the pleadings should properly be amended so as to proceed in the new name. **Wesley v. Shenandoah, etc., Co.**, 83 Va. 768. And see **City of Olney v. Harvey**, 50 Ill. 453; **Thomas v. Visitors of Frederick County School**, 7 G. & J. 369. But it is held that the judgment will be valid if the proceeding go on in the old name. **Water Lot Co. v. Bank of Brunswick**, 53 Ga. 80.

It is held that a change of name by the corporation will not avoid a subscription to stock or bonds. **Town of Reading v. Wedder**, 66 Ill. 80; **Bucksport & Bangor R. Co. v. Buck**, 68 Maine, 81.

For proceedings held sufficient under Illinois statute as to change of name, see **Anthony v. International Bank**, 93 Ill. 225.

15. Change of name by order of court.—Under a statute authorizing a court to grant amendments to corporate charters if lawful and beneficial, it was held that a change of name would not be granted without a good reason shown. **Bank of North America**, 2 Penn. Co. Ct. Rep. 97. In this case the “Bank of North America” made application to change its name to “German-American Bank.” The application was opposed by the “German-American Title Insurance, Trust & Safe Deposit Company.” The showing made was that many of its stockholders were German-Americans and that the change would help the business of the bank among the German-American population. It was held that the reason was not sufficient. See further cases cited in section 17; also **Excelsior Oil Co.**, 3 Penn. Co. Ct. Rep. 184.

16. Statutes designed to prevent a corporation from taking a name the same or similar to one already in use by another corporation.—A statute of Missouri provided that articles of incorporation should set out the name of the proposed corporation, “which shall not be the name of any corporation heretofore incorporated in this state for similar purposes, or an imitation of such name.” There was an existing corporation by the name of the “Kansas City Real Estate & Stock Exchange.” The relators proposed to organize a corporation by the name of the “Kansas City Real Estate Exchange,” to do a similar business in the same city. The secretary of state refused a certificate, and the relators applied for a mandamus to compel him.

to issue one. The relief was refused. The court, after referring to the cases which hold that corporations will be protected in the use of their names as persons are in the use of trade marks, says: "It is the evident purpose of our statute to protect, to some extent, these common-law rights, and, to do this, both as to the corporation first adopting the name, and as to the public, which may be misled by the similarity of the two names. It is difficult to state a precise rule by which one name may be said to be an imitation of another, in the sense of the statute. Where, however, the names so far resemble each other that a person using that care, caution and observation which the public uses, and may be expected to use, would mistake one for the other, then the new name is to be regarded as an imitation of the former. The character of the business and the location of the two corporations must be considered. Now, in the present case, both corporations are located in the same city. Both are created for precisely the same purposes, i. e., to establish and maintain a place, with a suitable building, for the public and private sale of real estate, stocks and other property. The only difference between the two names consists in the use of the words 'and stocks.' These words appear in the name of the former corporation, but are omitted in the name adopted by the relators. The omission of them from the combination with the other words, it is believed, does not furnish a fair distinguishing feature. A reasonably prudent person would be constantly liable to mistake the one for the other. It is doubtless the purpose of both corporations to encourage the public sale of property, real and personal, at their place of business, under mortgages, deeds of trust and the like, and the names ought not to be so similar as to lead to confusion and litigation." *State ex rel. Hutchinson v. McGrath*, 92 Mo. 355. See, also, *State ex rel. v. McGrath*, 75 Mo. 424.

A statute of Massachusetts in regard to the organization of fraternal beneficiary corporations provided that "the name shall be one not previously in use by an existing corporation, nor so similar as to be liable to be mistaken therefor." The certificate of incorporation was required to be submitted to the insurance commissioner, who could make such examination and require such evidence as he deemed necessary, and, if he found that the purposes and proceedings of the corporation conformed to law, he was to certify his approval thereof. The certificate was then to be filed with the secretary of state, and upon payment of a certain fee he was required to issue a certificate in a specific form which was declared to be "conclusive evidence of the existence of such corporation at the date of such certificate." The plaintiff, the "American Order of Scottish Clans," filed a bill against the insurance commissioner, the secretary of state and other defendants to prevent the latter from completing an incorporation under the name of the "Order of Scottish Clans." After the suit was commenced the certificate was approved by the insurance commissioner and the final certificate of incorporation issued to the new corporation. The bill was then amended to enjoin the use of the name. The trial court found as a fact that the name of the new corporation was so similar to the plaintiff's name as to be liable to be mistaken therefor. But the Supreme Court held that the decision of the insurance commissioner was conclusive as between private parties and denied the relief. The court says: "How far one name not absolutely the same as another resembles it is a matter of degree, and whether

one is so like the other as to be liable to be mistaken for it is a matter of judgment, not admitting of exact measurement. If the judgment of the commissioner is ever conclusive, we cannot go behind it simply because we think it very plain that he made a mistake. The plaintiff got no better standing by seeking to anticipate the action of the statutory tribunal. The case is not like those where a court of equity enjoins parties from proceeding with an action at law. That is done to enforce some equitable principle which a court of law would not recognize. But the commissioner is bound to proceed upon the same principles that this court would proceed upon. It is part of his duty to pass on the question whether the name applied for has the prohibited resemblance to that of an existing company. We must assume that he will do his duty, and is competent to form a judgment on the question. We cannot prohibit him from doing what the statute expressly commits to his determination, neither can we prohibit private parties from applying to him to do it in the manner expressly authorized by statute." *American Order of Scottish Clans v. Merrill*, 151 Mass. 558; 24 N. E. Rep. 918. *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 486, is a similar case, in which it was also held that a name was not "previously in use by an existing corporation" within the meaning of the statute, unless it was employed as a corporate name; that it was not enough that the name was used in its business.

Under the Laws of Illinois persons desiring to form a corporation make an application to the secretary of state for a license, which application must state, among other things, the name of the proposed corporation, and the secretary of state is forbidden to issue a license to two companies having the same name. It has been held that a foreign corporation cannot enjoin the organization, under Illinois laws, of a corporation having the same name as the plaintiff. *Lehigh Valley Coal Co. v. Hamblin*, 28 Fed. Rep. 225.

It is also provided by statute in Illinois that "in changing the name of any corporation, no name shall be adopted similar to the name of any other corporation organized under the laws of this state." Held, that a corporation cannot change its name so as to adopt a name used by a corporation which, though not fully organized, has received its license for incorporation, even though such license was obtained after the directors of the former company had called a meeting to vote on the proposed change of name, and had published notice of such meeting. *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423; 31 N. E. Rep. 400.

Under a Massachusetts statute providing that "no corporation established under the laws of another state or country shall carry on a banking, mortgage loan and investment, or trust business" in Massachusetts under a name previously in use by a domestic corporation, or so nearly identical as to mislead, and giving a remedy by injunction to the party aggrieved, it was held that the name "International Loan & Trust Company of Kansas City," or the same with the addition of the abbreviation "Mo.," is not so nearly the same as "International Trust Company" as to mislead; and a domestic corporation which has previously owned and done business under the latter name is not entitled to an injunction against a foreign corporation to restrain it from doing business under the former name, though defendant's corporate name is actually "International Loan & Trust Company," but that the petitioner was enti-

tled to an injunction against the defendant to restrain it from doing business under its corporate name. *International Trust Co. v. International Loan & Trust Co.*, 158 Mass. 271 ; 26 N. E. Rep. 698.

17. **Similarity of name to that of another corporation, as a ground for refusing a charter or change of name by a court.**—Under a statute which permits a court to order a change of name upon application of a corporation for that purpose, when it appears "that there is no reasonable objection to such corporation changing its name," it has been held that the court exercises a discretion which will not be interfered with on appeal, except in the case of manifest abuse, also that the similarity of the name desired to that of an existing corporation is sufficient justification for refusing the application. *In re Bank of Attica*, 12 N. Y. Supp. 648; *Matter of U. S. Mercantile Reporting & Col. Agency, Limited*, 115 N. Y. 176. In the former case a change to "Buffalo Commercial Bank" was allowed, though there was another corporation by the name of "Bank of Commerce in Buffalo." In the other case the petitioner desired to change its name to that of "United States Commercial Agency and Collecting Company, Limited," and was opposed by "The United States Mercantile Reporting Company." The court denied the application, and this decision was approved by the Court of Appeals, but at the same time the opinion was expressed that the application might properly have been granted.

In a more recent case it was held that where a corporation chartered under the name of the "United States Mortgage Company" afterwards acquires the powers of a trust company, leave to change its name to the "United States Mortgage & Trust Company" will not be refused on the ground that it resembles the name of the "United States Trust Company of New York," another existing corporation; and it is immaterial that the last-named corporation is commonly known as the "United States Trust Company." *VAN BRUNT*, P. J., dissenting. *In re United States Mortgage Co.*, 82 N. Y. Supp. 11

Under the laws of Pennsylvania, the certificate of incorporation of certain corporations is required to be submitted to a judge of court, who is to examine the same and, if he finds it to be in proper form and within the purposes named in the act, and "if it shall appear lawful and not injurious to the community," then he is to enter an order approving the same. Under this statute it has been held that the similarity of the name of the proposed corporation to that of an existing corporation is a sufficient reason for refusing a charter. *In re Waverly Ladies of the Red Cross*, 12 Penn. Co. Ct. Rep. 589; *First Presbyterian Church of Harrisburg*, 2 Grant's Cas. 240. In the first case there was an existing corporation having the name of the "Society of the Red Cross." A charter was refused to "The Waverly Ladies of the Red Cross," but granted to "The Waverly Ladies of the Order of the Red Cross." In the other case a charter was refused to the "First Presbyterian Church of Harrisburg," because the name was liable to be confounded with that of the "English Presbyterian Congregation of Harrisburg," which was commonly known as "The Presbyterian Church," or as "The Presbyterian Church of Harrisburg." In a case where the governor acted instead of a judge, a charter was granted to the "North Fifth Street Mutual Land Association," over the

protest of the "North Fifth Street Real Estate Company." North Fifth St. Mut. Land Assn., 8 Penn. Co. Ct. Rep. 15.

18. Charter refused because name too indefinite.—In Nether Providence Association, 2 Penn. Dist. Ct. 702; S. C., 12 Penn. Co. Ct. Rep. 666, a charter was refused for the reason, among others, that the name was too indefinite. The act contained no particular requirement as to the name. It required the name to be stated in the certificate of incorporation. The general duty of the court in passing upon the certificate is stated in the last section. The name chosen was "The Nether Providence Association." The court says: "The name is too comprehensive, vague and uncertain. Like the title to an act of assembly, it should at least indicate the purpose of the charter." The correctness of this conclusion may well be doubted. There were other good reasons for refusing the charter.

19. Statutes requiring a name to indicate a corporation.—A statute of Missouri provided that the secretary of state should not issue a certificate to any company or association "where the corporate name and style assumed is the name of a person or firm, unless there be joined thereto some word designating the business to be carried on, followed by the word 'company' or 'corporation.'"

It was held that the name of "Mallinckrodt Chemical Works" was not within the statute, as it was neither the name of a person or firm. As to the object of the statute the court says: "The object of the statute in question, undoubtedly was to prevent corporations from conducting business in firm names, and in the names of individuals, thereby misleading the public into the belief that they are dealing with individuals, and are entitled to the protection afforded by their personal liability." State ex rel. Mallinckrodt v. McGrath, 75 Mo. 424.

20. Statutes making the assumption of a corporate name, without being incorporated, a criminal offense.—The Criminal Code of Illinois contains a provision as follows: "If any company, association or person puts forth any sign or advertisement, and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated, or, being incorporated, puts forth any sign or advertisement, assuming any other or different name than that by which it is incorporated or authorized by law to act, such company, association or person shall be fined not less than \$10 nor more than \$200, and a like sum for each day he or it shall continue to offend, after having been once fined." R. S. Illinois, chap. 38, § 220. It has been held that assuming a name appropriate to a corporation and putting it on a sign and advertisement, was not a violation of the act, unless it was done for the purpose of soliciting business. Edgerton v. Preston, 15 Ill. App. 28. In Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494; 30 N. E. Rep. 839, it was held that it was a violation of the statute for persons to do business under the name of the "Hazelton Boiler Company," and that they could not acquire any right to the name, as a trade name, while so violating the law.

21. Protection of the corporate name as a trade name or trade mark.—In Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278; 8 Am. Corp. Cas. 210, it appeared that certain persons by the

name of Holmes, Booth and Hayden formed a corporation with the corporate name of "Holmes, Booth & Haydens." Subsequently Holmes and Booth withdrew, and they and others organized a new corporation under the name of "Holmes, Booth & Atwood Manufacturing Company." Both companies were engaged in the same business, both had their factories in the same town and both had stores upon the same streets in Boston and New York. It was shown that the similarity of names resulted in confusion of correspondence, mistakes in the delivery of orders and goods, and that dealers in the market were liable to be confused and misled into the belief that they were one and the same. Upon a bill by the older corporation against the younger, to enjoin it from the use of the names Holmes and Booth, or either of them, in its corporate name, the relief was granted and the following propositions laid down: 1. Where the corporate name has come to be a designation of the origin and ownership of the goods manufactured by the corporation, it will be protected in the use of its name, upon the same principle and to the same extent, that individuals are protected in the use of trade marks. 2. Where a corporation, with the consent of its principal stockholders, has embodied their names in the corporate name, the right to use the name so adopted will continue during the corporate existence. 3. Such stockholders, or any of them, forming a new corporation for the same business, cannot embody their names in the corporate name of the new corporation, in such a way as to mislead the public into the belief that the two are the same.

The cases quite uniformly support the right of a corporation to be protected in the use of its name in connection with its trade or business, as against another corporation using the same or a similar corporate name in the same business, in such a way as to mislead the public and prejudice the business of the former. *Merchants' Detective Assn. v. Detective Mercantile Agency*, 25 Ill. App. 250; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Farmers' Loan & Trust Co. v. Farmers' Loan & T. Co. of Kansas*, 21 Abb. N. C. 104; S. C., 1 N. Y. Supp. 44; *Ex parte Walker*, 1 Tenn. Ch. 97; *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.*, 21 Fed. Rep. 276; *Newby v. Oregon Central R. Co.*, Deady, 609. In the following cases the general principle is admitted, but the facts were held not to warrant the relief: *Drummond Tobacco Co. v. Randall*, 114 Ill. 412; *Neb. Loan & Trust Co. v. Nine*, 27 Neb. 507; 43 N. W. Rep. 348; *Hygeia Water Ice Co. v. New York Hygeia Ice Co., Limited*, 140 N. Y. 94; 35 N. E. Rep. 417.

Where certain words are used in the corporate name to designate the kind of business done, and such words have been used in the names of all corporations organized to do that business, one such corporation cannot enjoin another from the use of such words in its name. *Employers' Liability Ass. Corp. v. Employers' Liability Ins. Co.*, 10 N. Y. Supp. 845; *Employers' Liability Ins. Corporation, Limited, v. Employers' Liability Ins. Co. of the United States*, 61 Hun, 552; 16 N. Y. Supp. 397. Where a foreign corporation was engaged in business in a state and a domestic corporation was subsequently organized with the same name, to engage in the same business in the same place, it was held that the domestic corporation could not enjoin the foreign company from the use of its name. *Ottoman Cahvey Co. v. Dane*, 95 Ill. 203. It was held in *Lehigh Valley Coal Co. v. Hamblen*, 23 Fed. Rep. 225,

that a foreign corporation could not enjoin the defendants from organizing a corporation under the laws of Illinois, with the same name and for the same purposes as the plaintiff, but whether the use of the name after organization, in such a way as to prejudice the plaintiff would be enjoined, was a question not involved and expressly reserved. In *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 149 Ill. 494; 30 N. E. Rep. 339, the plaintiff, the Hazelton Boiler Company, was a foreign corporation doing business in Illinois, and the defendant was an Illinois corporation engaged in the same business. The defendant was the senior corporation, but the incorporators and assignors of the plaintiff, prior to the organization of either corporation, had carried on business in Illinois under the name of "Hazelton Boiler Company." The plaintiff sued to enjoin the defendant from using its corporate name, or the name "Hazelton boiler," or "Hazelton" in their business. The relief was denied on the ground that the defendant, by prior incorporation, had a superior right to its corporate name, and that no right could be based upon the prior use of the name "Hazelton Boiler Company" by the plaintiff's assignors and incorporators, because that was the assumption of a corporate name by persons not incorporated, in violation of the Criminal Code.

Whether any distinction would be made between a foreign corporation and a domestic corporation, either as plaintiff or defendant, in suits for the protection of the corporate name, as a trade name, does not seem to be decided. In the case last cited the court says: "But the complainant is in the attitude of a foreign corporation coming into this state, and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own public policy and in the exercise of its own sovereignty, has seen fit to bestow upon one of its own corporations. For such a purpose a foreign corporation, ordinarily, at least, can have no standing in our courts. Such corporations do not come into this state as a matter of legal right, but only by comity; and they cannot be permitted to come for the purpose of asserting rights in contravention of our laws and public policy. It is competent for this state, whenever it sees fit to do so, to debar any or all foreign corporations from doing business here; and whatever it may do in the way of chartering corporations of its own, cannot be called in question by corporations which are here only by a species of legal sufferance. We would not be understood, however, as holding that cases may not arise where the name of a foreign corporation has so far become its trade mark or trade name as to entitle it to protection in our courts against infringement caused by the chartering of a domestic corporation by the same name." *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494; 30 N. E. Rep. 339.

Where the law provides that a corporation shall not be formed with a name, the same or similar to one in use by an existing corporation, but also provides, as a condition of incorporation, that the incorporation papers shall be submitted to an officer and approved by him, after an examination and the hearing of evidence, if necessary, to ascertain that the purposes and proceedings of the corporation conform to law, it has been held that a senior corporation cannot contest, in the courts, the right of a junior corporation to use its name in its business, on the ground that it is so similar as to prejudice the senior corporation in its business. *American Order of Scottish Clans v. Merrill*, 151 Mass. 558; 24

N. E. Rep. 918. The defendants had incorporated under the name "Order of Scottish Clans." Both were organized for the same purpose. Upon the point in question the court says: "The plaintiff attempts to maintain its bill, not merely under the statute, but also on the ground that it is entitled to have its name protected as a trade name. We think it plain that if its name can be called a trade name in any sense, the plaintiff gets no additional right on that account. It received its name in the first instance as a corporate name under the statute, subject as such to whatever interference, by subsequent corporations, might be permitted under the statute. The name remained subject to the same degree of interference, whatever importance it might acquire in a business way. The principle is somewhat like that upon which patentees have been denied the exclusive right to the name of their patented articles as trade marks after their patents have expired. The degree of protection to which the plaintiff is entitled is measured by the rights which the statute confers upon it. The limit is marked by the adjudication of the insurance commissioner. See *Linoleum Manuf. Co. v. Nairn*, 7 Ch. Div. 834; *In re Palmer's Trade Mark*, 24 Ch. Div. 504, 517, 521; *In re Ralph's Trade Mark*, 25 Ch. Div. 194, 199; *Coats v. Merrick Thread Co.*, 86 Fed. Rep. 324. Where there are no statute provisions as to the choice of names, and parties organize a corporation under general laws, it may be that they choose the name at their peril; and that if they take one so like that of an existing corporation as to be misleading, and thereby to injure its business, they may be enjoined, if there is no language in the statute to the contrary. *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manuf. Co.*, 37 Conn. 278; *Newby v. Oregon Central R. Co.*, Deady, 609; *Celluloid Manuf. Co. v. Cellonite Manuf. Co.*, 32 Fed. Rep. 94, 97. But these decisions do not apply to a case where the plaintiff and the defendant both get their names under a statute requiring such an adjudication as was required by the act of 1888." Compare cases cited in last section.

The Southern Medical College instituted a department of dentistry, which was properly known and called the Dental Department of Southern Medical College. Defendants, some of whom had been professors and instructors in said dental department, were proposing to organize a corporation in the same place for giving the same instruction under the name of "Southern Dental College." The Southern Medical College sued to enjoin the use of such name, claiming that their dental department was conducted and known under the name defendants were proposing to use. Under the showing made, it was held that a preliminary injunction was properly denied. *Southern Medical College v. Thompson*, (Ga.) 18 S. E. Rep. 430.

Where a committee appointed by the members of a voluntary association to procure a charter of incorporation obtain such charter, and organize thereunder, calling the corporation by the name of the voluntary association, the members of the association cannot enjoin such corporators from acting under the charter, in that, having been granted by the legislature, it can only be forfeited or revoked by the legislature, or at the suit of the state. *Paulino v. Portuguese Ben. Assn.*, (R. I.) 26 Atl. Rep. 36. Nor can the members of the association maintain a bill to enjoin the use of the name of the corporation, since the act of incorporation fixed the name such corporation was to bear, and since the right to use that name was part of its franchise, conferred on it by law.

FIFIELD V. COMMON COUNCIL OF CITY OF PHOENIX.

(Supreme Court of Arizona, March 8, 1894.)

MUNICIPAL CORPORATIONS. LIABILITY FOR INJURIES BY DISCHARGE OF FIREWORKS. A city is not liable for injuries caused by a discharge of fireworks because the city authorities suspended, for the day of the accident, an ordinance forbidding the discharge of fireworks.

ACTION by George Fifield against the common council of the city of Phoenix. From a judgment for defendant, plaintiff appeals.

Kibbey & Israel, for appellant. *L. H. Chalmers*, for appellee.

HAWKINS, J. This was an action by appellant to recover damages for personal injuries sustained by him. He based his claim for relief upon the facts that the appellee is a municipal corporation created by an act of the legislative assembly of the territory, approved February 25, 1881, and an act of March 11, 1885, amendatory thereof; that the corporation, in 1889, ordained, among other things, that it should be unlawful for any person, within certain city limits, to make any bonfire, discharge any firecrackers, skyrocket or any fireworks whatever, etc., without first having obtained permission therefor from the city marshal (this ordinance was in effect at the time of appellant's injuries); that on the 15th day of February, 1893, the city, by and through its members, its mayor and its marshal, unlawfully and negligently granted to certain Chinese permission to set off, discharge and explode fireworks upon certain streets of said city within the fire limits; that appellant, a hack driver, on that day, while in the proper pursuit of his business, was driving along the streets of said city; that, while so driving along a street within said fire limits, the Chinese, acting under the permit so granted them, fired off and exploded a large quantity of fireworks, firecrackers and bombs, whereupon appellant's horses (they being gentle and well broken) became frightened and unmanageable, and threw appellant to the ground, all without fault upon his part, and he was thereby very seriously injured, sustaining a very serious fracture of the leg, and otherwise bruised. The court below sustained a

general demurrer to the complaint on this state of facts, and appellant asks that the ruling be reversed.

Section 7 of article 18 of the charter of the city of Phoenix provides, as follows: "Sec. 7. That said corporation shall not be liable to any one, or for any loss or injury to person or property growing out of or caused by the malfeasance, misfeasance or neglect of duty of any officer or other authorities of said city, or for any injury or damages happening to such person or property on account of the condition of any zanja, sewer, cesspool, street sidewalk or public ground therein, but this does not exonerate any officer of said city or any other person from such liability when such casualty or accident is caused by willful neglect of duty enforced upon such officer or person by law or by the gross negligence or willful misconduct of any such officer or person in any other respect." It seems to us that any fair construction of this section inhibits such form of action against the city. Appellant, in his reply brief, disclaims any negligence on the part of the city marshal in granting the permit, but says it became the negligent act of the city itself, and such city was an agency in the committing of the injury. We are unable to agree to this line of argument. It could not do more than to undertake the evasion of the plain letter of the city charter. Under this charter, if the city officer performs an act which is authorized by an ordinance, it would not, on his part, be negligence. Then, how could it become negligence on the part of the city itself? Plymouth, Ind., had an ordinance prohibiting the firing of gunpowder, or any other substance, except on occasion of public rejoicing, when the mayor granted permission to fire guns, cannons and other things in which gunpowder was used. On the 4th of July, 1885, the mayor granted permission to fire gunpowder in an anvil on a lot in said city; and when it was fired it blew gravel and stones against one Wheeler's plate-glass windows, and broke them. The Supreme Court of Indiana, in *Wheeler v. City of Plymouth*, 116 Ind. 158; 18 N. E. Rep. 532, in passing upon the question of the liability of the city, says: "A city which has an ordinance prohibiting the firing of gunpowder, but allowing the mayor to license such firing on certain occasions, is not liable for the damage occasioned by the negligence of the licensees, there being nothing to show that the authorized act was necessarily dangerous."

It is also decided in the same case that "there is no actionable breach of corporate duty in failing to enact a proper ordinance, or in failing to enforce one that has been enacted; and consequently this action cannot be maintained upon the theory that there was a proper ordinance, nor upon the theory that the ordinance was not enforced." Under this theory it seems clear that the action at bar could not be maintained if the ordinance was not enforced. Then, upon what system of reasoning could it be maintained because it was suspended for a day? For failing in governmental action, municipal corporations are responsible only to their corporators, or the power creating them. Cooley Torts, 620. It shows no ground of action when one complains that he has suffered damages because the operation of an ordinance which prevents the explosion of fireworks within the city has been temporarily suspended. Ibid. *Lincoln v. City of Boston*, 148 Mass. 578; 20 N. E. Rep. 329, was also a case where the mayor permitted the firing of cannon upon the commons under an ordinance forbidding it unless such permission was given, and the plaintiff's horse took fright and ran away on a neighboring street. This license to fire cannon was held to be an act of municipal government, and the person doing the firing was not the city's agent, so as to make the city liable. The firing of the Chinese bombs, in the case at bar, was not the act of the city, nor did the city have any agency in said act. A licensee does not thereby become the agent of a municipal corporation. Ibid.; *Fowle v. Alexandria*, 3 Pet. 398. Chief Justice MARSHALL, in *Fowle v. Alexandria*, says: "That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves, are liable for torts, is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a non-feasance — by an omission of the corporate body to observe a law of its own, in which no penalty is provided — is a principle for which we can find no precedent." *Rivers v. Common Council*, 65 Ga. 376, is a well-considered case, and is very similar to the case at bar. The plaintiff, a minor child, while walking upon one of defendant's streets, was seriously gored by a cow which was running at large in the streets of said city. She sued the corporation for damages alleged to be sustained by reason of this

misfortune. It will be noticed by reference to the facts in this case, that the allegations of the declaration are quite similar to the complaint in the case before us. In 1878 the city had an ordinance against cattle running at large. This ordinance was suspended at the time of the injury to the child. Mr. Justice CRAWFORD says: "The adoption of an ordinance in reference to allowing cattle to run at large in the city is one which is wholly legislative, and, therefore, discretionary. It is not liable in damages for neglecting, omitting or refusing to notice the subject, or having noticed it, and adopted an ordinance concerning it, then to repeal or suspend it." The same reasoning would undoubtedly apply to an ordinance against the firing of bombs, etc. In the Georgia case it was argued that, so long as a city fails to legislate, it is not liable, but, when it does, then its liability for damages accrues. The court was unable to appreciate this difference, but cited the case of *Hill v. Board*, 72 N. C. 55, as a case directly in point. An ordinance prohibiting the use of fireworks was passed, remained in force some years, was then suspended from the twenty-fifth day of December to January first, inclusive. During this time, by the firing off of squibs, firecrackers and Roman candles, plaintiff's house was burned, for which he sued the city. Held, that it was within the discretion of the authorities to determine, from time to time, what ordinances were proper, and that the corporation was not liable. Also, see *Tindley v. City of Salem*, 50 Am. Rep. 289; *Hill v. Board*, 21 Am. Rep. 451. If the ordinance in question had been repealed on the day before the accident to appellant, it seems clear that there could be no liability against the city. Then, upon what system of reasoning could he recover simply because the ordinance was suspended on the day of the accident?

Appellant, in his brief, relies upon the cases of *Cohen v. Mayor, etc.*, 113 N. Y. 532; 21 N. E. Rep. 700; *Spier v. City of Brooklyn*, 139 N. Y. 6; 34 N. E. Rep. 727. In *Cohen v. Mayor, etc.*, the facts were that the city, by a permit, allowed a grocer to keep a wagon in front of his store, when not in use. On a certain morning, Cohen was walking along the street, in front of the grocer's store. At the same time a wagon loaded with ice was passing in one direction, and one loaded with coal was passing in the other. The grocer's wagon, without any horse attached, was

standing in front of his store. The thills were tied up in a perpendicular position with a string. The length of the wagon was parallel with the course of the street. The ice wagon, probably in attempting to avoid the coal wagon, caught against the wheel of the grocer's wagon, turned it around, and loosened the thills, so that they fell and struck Cohen on the head, injuring him so that he died the next day. The city was held liable. The court held that the permission was not authorized by law, and that the owner of the wagon acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a nuisance. The defendant was also guilty because it assumed to authorize the erection and continuance of a nuisance. The legal power to obstruct the street by grant of a license had been withheld by the legislature from the city. Nevertheless, it did grant such a permit, and took a compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance. *Spier v. City of Brooklyn*, supra, was a case where fireworks were allowed by the mayor, under an ordinance, at the junction of two narrow streets in the city of Brooklyn, and plaintiff's property was destroyed, and the city was held liable; the court having held that the circumstances of that particular case made the same a public nuisance, and the plaintiff recovered under that theory. Such displays, the court seemed to think, should be under the supervision of the municipal authorities, and it was probably entirely proper for the court to rule as it did in this particular case. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injuries to persons or property. The action in the case at bar is not upon the theory that the city was guilty of unlawfully erecting and maintaining a nuisance. A city is liable for maintaining a nuisance, unless expressly authorized by law to do so. It was on this theory a recovery was had in the New York cases. It may have been an error of judgment in the officers of the city in granting the permit or suspending the ordinance on the particular street on the day alleged, but cities are not responsible for errors of judgment of their officers in the enforcing of their laws. We must conclude that, both from the reading of the charter of

the city, and the weight of authority, the chief justice was correct in sustaining the demurrer, and the judgment is affirmed.

ROUSE and SLOAN, JJ., concur.*

Municipal corporations — liability for injuries or damages by the discharge of fireworks.— Cases similar to the principal one and decided the same way are *Ball v. Town of Woodbine*, 61 Iowa, 83; *Hill v. City of Charlotte*, 72 N. C. 55. The case of *Spier v. City of Brooklyn*, referred to in the opinion in the principal case, will be found in 8 Am. R. R. & Corp. Rep. 679. See, also, *Robinson v. Greenville*, 42 Ohio St. 625, and *Borough of Norristown v. Fitzpatrick*, 94 Penn. St. 121, where the plaintiff was injured by the firing of a cannon in a public street.

PETTINGELL V. CITY OF CHELSEA.

(Supreme Judicial Court of Massachusetts, May 18, 1894.)

MUNICIPAL CORPORATIONS. LIABILITY FOR NEGLIGENCE IN MAINTAINING FIRE ALARM POLES. A city is not liable to one employed by it as a lineman on its fire-signal system, who is injured by the breaking of a pole to which the wires of the system were attached, though the breaking was due to the negligence of the city.

ACTION by William H. Pettingell, by his next friend, Amos Pettingell, against the city of Chelsea, to recover damages for personal injuries received by him while working for said city as a lineman on its fire-signal system. Judgment for defendant. Plaintiff appeals.

M. T. Allen, for appellant. *D. E. Gould*, for appellee.

FIELD, Ch. J. This is an appeal from an order of the Superior Court sustaining a demurrer to the plaintiff's declaration, and directing judgment for the defendant. The declaration contains two counts — the first at common law, and the second under the Statutes of 1887, chapter 270. The demurrer is general, but the point is not that the second count contains no allegation that notice of the time, place and cause of the injury was given to the defendant. We assume that the Statutes of 1887, chapter 270, may apply to cities and towns. See *Connolly v. City of Waltham*, 156 Mass. 368; 31 N. E. Rep. 302; *Conroy v. Inhabitants of*

* Reported in 89 Pac. Rep. 916.

Clinton, 158 Mass. 318; 33 N. E. Rep. 525. But the statute in terms only gives to an employee who has received personal injury from the causes described in the first three clauses of the 1st section, or to his legal representatives in case the injury results in death, "the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in its work." The question, then, is whether a city is responsible in damages to any person who, in the exercise of due care, is injured by the breaking of a pole to which was attached the wires of the fire-signal system of the city, if the pole broke because it was "negligently constructed, cared for, maintained and placed" in its position. The special authority of the city of Chelsea to establish a fire department is found in the Statutes of 1881, chapter 200, section 16. In *Hafford v. New Bedford*, 16 Gray, 297, it was held that the city was not liable for the negligence of the members of a fire department established by the city council pursuant to an act of the legislature. In that case the alleged negligence consisted in the members of the fire department carelessly driving a hose carriage against the plaintiff in a public highway during an alarm of fire. In *Fisher v. Boston*, 104 Mass. 87, the plaintiff was injured by the bursting of hose connected with a fire engine, which was alleged to have been defective, and to have been negligently used at a fire by members of the fire department. It was held that the city was not liable. In the opinion it is said that "in the absence of express statute therefor, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town house or public way." See *Tainter v. Worcester*, 123 Mass. 311. The present case, we think, comes within the general doctrine declared in *Hill v. Boston*, 122 Mass. 344, viz.: "That no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." Judgment affirmed.*

* Reported in 161 Mass. 868; 87 N. E. Rep. 880.

1. Municipal corporations—liability for negligence of fire department.—A city is not liable for the negligence of a fireman engaged in the line of his duty, nor for injuries resulting from defects in the apparatus for extinguishing fires. *Lawson v. City of Seattle*, 6 Wash. 184; 33 Pac. Rep. 347.

The fire boat "New Yorker," belonging to New York city, in hastening to reach a fire opposite pier 48, East river, collided with a barkentine which was properly moored to the dock. At the time of the collision another fire boat was already at work on the fire. Held, that the urgency created by the duty to extinguish the fire was not so extreme as to excuse the "New Yorker's" failure to exercise reasonable care. *Workman v. City of New York*, 63 Fed. Rep. 298. Laws of New York, 1882, chapter 410, section 27, declares that, "for all purposes, the local administration and government of the city of New York, shall continue to be in, and to be performed by, the corporation aforesaid," i. e., the mayor and aldermen. Section 34 creates "the following other departments"—among them, the fire department—and the act declares the powers and duties of these departments to be "administrative and governmental." Held, that the extinguishment of fires is a work of local administration, within the meaning of the statute, and as such, though assigned to the fire department of the corporation, is a duty of the corporation, to be performed by that department as its agent, and that the corporation is liable for a tort committed by its agent in negligently performing such duty; and is also liable as "owner of the vessel" under the maritime law. *Ibid.* See, also, *Jenney v. City of Brooklyn*, 120 N. Y. 164; 24 N. E. Rep. 274.

Where a judgment had been obtained against a fire district for injuries resulting from the conducting of electricity into a house by means of one of the wires in the district's electric fire-alarm system, it cannot be said that the district was so clearly exempt from liability for negligence of that sort that a settlement of the claim by compromise was ultra vires, or without consideration. *Prout v. Pittsfield Fire District*, 154 Mass. 450; 28 N. E. Rep. 679.

2. Liability for wrongful arrest by policeman.—A town is not responsible for an unlawful arrest by the town marshal, since in making arrests he is acting for the public, and is not the agent of the town. *Town of Laurel v. Blue*, 1 Ind. App. 128; 27 N. E. Rep. 801; *Woodhull v. City of New York*, 76 Hun, 890; 28 N. Y. Supp. 120.

3. Liability for wrongful closing of circus by mayor and police.—Where the mayor and police of a city close a circus that is being held on ground claimed to have been dedicated as a public graveyard, they act for the city in its governmental, not its corporate, capacity, and the maxim "respond-eat superior" does not apply, so as to make the city liable in damages for their action. *City of Kansas City v. Lewen*, 6 C. C. A. 627; 57 Fed. Rep. 905.

4. Liability for negligence in erecting a market house.—Where a city, under the provision of its charter, erects a market place, it is exercising a private or proprietary right, and is held to the same degree of care in the preparation and adoption of plans, and in the construction thereof, as a private corporation or individual, and liable for negligence to the same extent. *Baron v. City of Detroit*, 94 Mich. 601; 54 N. W. Rep. 273.

5. Liability of county for neglect in care of jail.—In the absence of a statute imposing such liability, a county is not liable in damages for the failure

of the board of commissioners to keep the county jail in a pure and inhabitable condition, though the board may be required by statute to build and keep the jail in repair. *Morris v. Switzerland County*, 131 Ind. 285; 31 N. E. Rep. 77.

6. Rule of nonliability of municipal corporation for negligence in matters of public concern.—A number of cases in these reports illustrate the distinction that is made between acts and undertakings for the private advantage of the corporation and such as are performed by it as a public or governmental agency. A city has been held not liable for the negligence of those in charge of a city workhouse. *Curran v. City of Boston*, 3 Am. R. R. & Corp. Rep. 130, and note. Nor for negligence in the erection of a school house. *Howard v. City of Worcester*, 4 Am. R. R. & Corp. Rep. 270. Nor for the negligence of a city jailer. *Davis v. City of Knoxville*, 5 Am. R. R. & Corp. Rep. 169. Nor for negligence of a member of the fire department. *Gillespie v. City of Lincoln*, 6 Am. R. R. & Corp. Rep. 527. Nor for negligence in use of elevator in city hall. *Snyder v. City of St. Paul*, 7 Am. R. R. & Corp. Rep. 122. Further illustrations, with some exceptions to the general doctrine, will be found in the notes to the cases cited.

WEBB V. SPOKANE COUNTY.

(Supreme Court of Washington, June 5, 1894.)

COUNTY COMMISSIONERS. POWER TO CONTRACT FOR SERVICES EXTENDING BEYOND TENURE OF BOARD. A board of county commissioners, having power to contract for the services of a county physician, has power to make such contract for a year, though the members of the board are about to go out of office in a few days.

ACTION by W. Q. Webb against the county of Spokane on a contract for medical services. Judgment for defendant. Plaintiff appeals.

W. D. Scott and Prather & Danson, for appellant. *Fenton & Henley* and *L. H. Plattor*, for respondent.

ANDERS, J. On January 4, 1892, by an order of the board of county commissioners of Spokane county, at a regular session, the appellant was employed as county physician of said county for the term of one year, beginning February 14, 1892, and ending February 14, 1893, at a salary of \$100 per month. On February 11, 1892, the board concluded to reconsider and annul the

contract with the appellant, and to receive bids for county physician up till ten o'clock A. M., Saturday, February 13, 1892; and on February 25, 1892, the board appointed Dr. Johnson county physician for the year ending February 25, 1893, at a salary of eighty-five dollars per month. Until February 25, 1892, the appellant performed the duties of county physician, but he was then requested to turn over to Dr. Johnson all medicines and other property in his hands belonging to the county, and the sheriff was likewise requested to proceed and take possession of and deliver the same to said Dr. Johnson. Some time after February 14, 1893, appellant instituted this action to recover the amount which he claimed to be due under his said contract with the said board of commissioners. The complaint sets forth the contract alleged to have been entered into between the plaintiff and the defendant, and alleges that in pursuance of said employment the plaintiff entered upon his duties as such county physician, and performed all services according to the terms of said agreement until the 25th day of February, 1892, when said board of county commissioners, without cause, discharged the plaintiff, and refused to allow him to perform said services as such county physician; and that during all of said time the plaintiff was ready, able and willing to perform said services according to the terms of said agreement of employment, and so notified said board of county commissioners. It is further alleged that the claim sued upon was presented to the board of commissioners, and payment thereof demanded and refused. The defendant answered by a general denial, and the cause proceeded to trial upon the issues thus raised. After the plaintiff had introduced his testimony, the court ordered a nonsuit on motion of defendant, and entered judgment for costs against plaintiff, to reverse which order and judgment this appeal is prosecuted.

The case, as presented and argued by counsel, involves but one question for the determination of this court, and that is, was there a valid contract entered into by and between the appellant and the board of county commissioners? It is provided by statute that "the board of county commissioners of the several counties of this state are vested with entire and exclusive superintendence of the poor of their respective counties" (1 Hill's Code, § 3087), and it seems to be conceded by the respondent, and it could not well

be denied, that the board of county commissioners, under this provision, had a right to provide for the services of a county physician by contract. But it is contended that, inasmuch as the term of office of each of the commissioners with whom the agreement was made expired on January 9, 1893, they had no authority to enter into a contract extending beyond that date, and that such a contract is contrary to public policy and void. This identical question arose in the well-considered case of *Board v. Shields*, 130 Ind. 6; 29 N. E. Rep. 386, and was decided adversely to the respondent's contention. In that case the board of commissioners of Pulaski county, Ind., by written contract, employed the appellee, Shields, to superintend the county asylum and poor farm of that county for the term of five years from April 1, 1884. The principal controversy in that case, as in this, was as to the validity of the contract, the county insisting that it was void; and in discussing this question the court said: "It is insisted, however, that this contract is void upon other grounds—that it is in contravention of public policy, for the reason that to uphold it would put it in the power of one board of commissioners to bind the hands of its successors; and that it operates as an unwarranted abridgment of the 'administrative, executive and legislative' powers of the board. The first of the reasons assigned rests upon an erroneous conception of the constitution of the board of county commissioners; that that body consists of a series or succession of boards, one following the other. As we have heretofore said, the board of commissioners is a corporation representing the county. From a legal standpoint, it is the county, as is said in *State v. Clark*, 4 Ind. 315, *supra*. It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason." That the law is correctly stated in the foregoing quotation seems, to our minds, to admit of no doubt. And it is conceded by the learned counsel for the respondent that the board of county commissioners has the right in some cases to enter into contracts the perform-

ance of which would extend beyond their term of office, such as contract for the erection of county buildings; but it is suggested that such contracts are founded in necessity, and not in principle. But it seems to us that such contracts are in fact founded in principle, and are within the legitimate powers of such boards. When the board of commissioners in this case proposed to employ the appellant for the period of a year, and he accepted such proposal, a contract was created which was binding upon both parties, and could not be rescinded at the mere will of either. *McDaniel v. Yuba Co.*, 14 Cal. 444. For aught that appears the agreement was entered into in good faith, and, if so, it ought not to be set aside for the reasons assigned. The judgment is reversed, and the cause remanded for further proceedings.

DUNBAR, Ch. J., concurs.

STILES, J. I concur in the reversal, because the contract made with appellant was reasonable under the circumstances; but I do not wish to be understood as subscribing in full to the doctrine enunciated in the case cited from Indiana.

SCOTT and HOYT, JJ., dissent.*

County commissioners — power to bind successors by making contracts for services extending beyond the life of the board.— In *Millikin v. Edgar County*, 142 Ill. 528; 82 N. E. Rep. 493, it is held that the Revised Statutes of Illinois, 1891, chapter 107, section 28, which authorizes the board of supervisors of counties to “appoint a keeper of the poorhouse, and all necessary agents for the management and control of the poorhouse and farm, and prescribe their compensation and duties,” do not empower such board, the members of which are themselves elected annually, to contract to employ a person as keeper for a term of three years.

The boards of county commissioners of the several counties of Kansas have exclusive control of the expenditures accruing either in the publication of delinquent tax lists, treasurers' notices, or other county printing, and, in pursuance of this power, have authority to designate the official newspapers of their respective counties, but such designation cannot continue for a longer period than one year, or so as to bind or tie the hands of their successors in office. *Shelden v. Board of Commissioners*, 48 Kans. 356; 29 Pac. Rep. 759. On the second Monday of January after each general election at which a commissioner has been elected, the board of county commissioners, as an organized body, is dissolved, and the office of chairman is vacant, and, before the commissioners can transact any county business other than to elect a chairman, or fill a vacancy in the office of a commissioner, the board must be again organ-

* Reported in 37 Pac. Rep. 282.

ized, and the hands of such new board or organization, as to the designation of the official newspaper of the county, are not tied by a prior order of the preceding board of county commissioners. Ibid.

In *Board of Commissioners v. Taylor*, 1 Am. R. R. & Corp. Rep. 496, it was held by the Supreme Court of Indiana that a contract made by a board of county commissioners, which was reorganized annually, by which an attorney was employed for three years, was against public policy and void. In the later case of *Board of Commissioners v. Shields*, 130 Ind. 6; 29 N. E. Rep. 385, which is referred to and stated in the principal case, the *Taylor* case is not overruled, but a distinction is made between a contract for the services of an attorney and for the services of a superintendent. The court, referring to the *Taylor* case, says: "It is not necessary that we here express either approval or disapproval of that case as applied to the facts then before the court. It is enough to say that one fact, which no doubt had great weight in leading the court to the conclusion reached, does not exist in this case. The contract there involved was for the employment of a county attorney or attorneys who, by virtue of such employment, would be the attorneys for the board. The relations existing between the attorney and his client are unlike those ordinarily existing between employer and employee. They are of an intimate and confidential character. The attorney, instead of acting under the direction and instruction of his client, is himself largely the adviser and instructor. One of the principal duties imposed upon him by his employment is to advise as to the law. There is, therefore, much reason in holding that the board, as personally constituted, should be at all times free to select its own confidential legal adviser."

DAILEY ET AL. V. STATE.

(Supreme Court of Ohio, May 21, 1894.)

1. **STREETS AND HIGHWAYS. RIGHTS OF ABUTTING OWNER IN SHADE TREES.** An owner of land adjoining a public highway, whose title extends to the center of the road, who has cultivated shade trees, planted partly on his own land and partly in the line of the highway, within the bounds of his deed, has a property interest in such trees, and the right to their enjoyment, subject only to the convenience of public travel.

2. **INDICTMENT AGAINST EMPLOYEES OF TELEGRAPH COMPANY FOR INJURY TO SHADE TREES. RIGHTS OF TELEGRAPH COMPANY IN STREET.** The legislature may authorize the construction of a telegraph line by a telegraph company upon a public highway, in such manner as not to incommode the public in the use of such highway, but authority so given does not empower such company to injure the property of an adjoining landowner, nor to appropriate any of his property rights in the highway, except upon the condition that compensation be first made, nor is warrant given to injure such property, nor to appropriate such property rights, without compensation, by the act of

congress of July 24, 1866, known as section 5263 et seq. of the Revised Statutes of the United States.

3. The property right of such owner in trees thus cultivated by him is a proper subject of legislation for its protection, and one who, having knowledge of the rights of such landowner in the trees, proceeds, against the protest of such owner, heedlessly, recklessly and carelessly to injure them, may be prosecuted, under section 6880 of the Revised Statutes, for a wrongful injury to property.

4. EFFECT OF LACHES OF OWNER. The simple fact that the landowner did not, at the time the telegraph line was built, although aware of the purpose to build, object and prevent its construction by injunction proceedings, will not estop him, after the expiration of ten years from the date of such construction, from asserting his property interest in the highway and in the trees growing upon and in front of his premises.

AT the September term, 1892, of the Court of Common Pleas of Portage county, the plaintiffs in error, R. J. Dailey, William Donahue, Edward Lingle and S. W. Kennedy, were tried upon an indictment which charged that on the 22d of September, 1892, they "wrongfully, unlawfully, and without lawful authority, did injure eight maple trees, the property of one E. E. Taylor, standing and growing upon land not that of said R. J. Dailey, William Donahue, Edward Lingle, and S. W. Kennedy, nor of each, either, nor of any of them, by cutting and severing from said trees, and from each and all of them, certain limbs and branches belonging thereto, and by otherwise injuring and defacing each and all of said trees and the bark thereof, contrary to the form of the statute," etc. The record shows that E. E. Taylor owned lands adjoining and to the center of a public highway. The road was about sixty-six feet in width, and had been established for over fifty years. His frontage was about one-third of a mile. The trees, some sixty in number, were planted by Mr. Taylor about forty years since, chiefly inside of the fence which was on the line of the highway. In the year 1882, a telegraph company, without obtaining consent of Mr. Taylor, or in any way appropriating a right to do so, erected its line upon the highway in front of his premises, placing the poles from twelve to sixteen feet from the fence line. The poles were about 130 feet apart, and on them were fastened cross arms six feet in length, upon which were stretched fourteen wires. The defendants (now plaintiffs in error) were employees of the Postal Telegraph Cable Company, and acted under orders from the company in cutting

the trees. At the time of the occurrence, Mr. Taylor objected, telling the men that the trees were his, as the owner of adjoining lands; that they had no right to cut them; and ordered them to desist. They replied that the branches interfered with the working of the line; that they had been directed to trim, and would do so. The trimming marred the symmetry of the trees, tended to make them one-sided, and injured them. The Postal Telegraph Cable Company, which now operates the line, is a corporation, organized under the laws of the state of New York in the year 1886, having lines extending through many of the states, and into Canada. On March 17, 1886, the company filed with the postmaster-general of the United States its acceptance, by resolution duly adopted, of the requirements of section 5263 et seq. of the Revised Statutes of the United States, and of all the restrictions and obligations required by law, in order to make its line an instrument of interstate commerce. When the company took possession of this line does not appear. The defendants were found guilty. Sentence followed, which, upon error to the Circuit Court, was affirmed. To reverse these judgments, the present proceeding in error is brought.

Wolf & Moore and I. T. Siddall, for plaintiffs in error. *E. T. Hanselman*, *Prosecuting Attorney*, for the state.

SPEAR, J. (*after stating the facts*). The conviction was had under section 6880 of the Revised Statutes, which provides that "whoever wrongfully, and without lawful authority, cuts down or destroys, or by girdling, or any other means, injures any vine, brush, shrub, sapling or tree, standing or growing upon land not his own, or severs from the land of another, or injures or destroys any product standing or growing thereon, or other thing attached thereto, shall be fined in any sum not more than one hundred and fifty dollars, or imprisoned not more than thirty days, or both."

Objection was made at the trial to the admission of any evidence under the indictment. Exceptions were also taken to the refusal to charge divers propositions tendered by counsel for defendants. But the principal question in the case is raised by

the exception to the following instruction, given by the court to the jury, viz.: "Upon the question as to the rights of the telegraph company, the court says to you that at the time of the erection of the poles and the construction of the telegraph line, whether in 1882 or 1884, the land upon which this highway was situated was the property of Mr. Taylor, subject to the right of way for public use for highway; that is, for travel and keeping it in repair as a highway. As between Mr. Taylor and other individuals or corporations, it could be used for no other purpose without entitling him to compensation for such use; and the entry of this telegraph company upon his land without compensation to him, or without an agreement between him and such corporation, if you find this corporation did so enter, was not a rightful entry or occupancy; and as to the trees growing upon this land at the time such company constructed its lines, as between him and such corporation, he had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company. The United States could not, nor has it attempted to take away by any statute that right. Mr. Taylor's right to maintain the trees in the ordinary way was an absolute right, and this right could be taken from him in no way until such time as they acquired the right to maintain such lines by prescription, which means actual occupancy for twenty-one years or more, or by appropriation or agreement; and for this company, by its agents, without first acquiring the right, to enter upon this land, and to cut the trees growing thereon, would be proceeding without lawful authority." If this instruction is wrong, the conviction cannot stand. It is maintained by the plaintiffs in error that the charge is erroneous because the Postal Telegraph Cable Company derived authority by force of section 3454 et seq. of the Revised Statutes of Ohio, and of section 5263 et seq. of the Revised Statutes of the United States (by which its line is made an instrument of interstate commerce), to enter upon and occupy the highway for its telegraph line, and was, therefore, rightfully there for the purpose of its business; and that, as it appears that what was done by the employees of the company in the way of trimming the trees of Mr. Taylor was done to prevent the branches from interfering with the operation of the telegraph line, their acts could

not be in violation of any right of Mr. Taylor, inasmuch as he could not be possessed of any right to intrude, by growing trees or otherwise, upon the right of occupancy and use thus acquired and enjoyed by the company. Such acts would not be, within the meaning of our criminal statute, wrongful; nor could the land, as respects the company thus rightfully in occupancy of the highway, be esteemed the land of another, within the meaning of section 6880. The sections of the Ohio statutes cited give authority to any magnetic telegraph company to construct telegraph lines from point to point along and upon any of the public roads and highways, etc., but the same shall not incommode the public in the use of such highway. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or by appropriation, for the purpose of making preliminary examinations and surveys, with the view to the location of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its poles, piers, abutments, wires and other necessary fixtures, and for stations, and the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its lines; but no such company shall, without the consent of the owner thereof in writing, enter any building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier or abutment in any yard, or in any inclosure within which an edifice is situate, nor erect any telegraph pole, pier, abutment, wires or other fixtures so near to an edifice as to occasion injury thereto, or risk of injury in case such pole, pier or abutment be overthrown, nor injure or destroy any fruit or ornamental tree. The sections of the United States statutes cited give to any telegraph company organized under the laws of any state the right to construct, maintain and operate lines of telegraph over and along any of the military or post roads of the United States, but the lines must not interfere with the ordinary travel on such roads; and, before any company can exercise any of the powers or privileges conferred, such company shall file its written acceptance with the postmaster-general of the restrictions and obligations required by law. A later section declares "that all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." It is

apparent that the only limitation expressed upon the right to maintain lines of telegraph upon the public highways is that they shall be so constructed as not to interfere with the public use of the highway. But the statute nowhere undertakes to deal with the private right of ownership in the highways, and the question arises whether it was the legislative purpose to give rights to telegraph companies inconsistent with the rights of the owner of adjoining lands in the highways.

Whatever may be the rule in other states, we have supposed that the question of the right in the highway of a landowner whose title extends to the center of the road is not an open one in Ohio. The question has been the subject of adjudication in a score of cases decided by this court, notably in the following: *Bingham v. Doane*, 9 Ohio, 167; *Crawford v. Delaware*, 7 Ohio St. 459; *Railroad Co. v. Cumminsville*, 14 Ohio St. 523; *Hatch v. Railroad Co.*, 18 Ohio St. 123; *McClelland v. Miller*, 28 Ohio St. 502; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Railroad Co. v. O'Hara*, 48 Ohio St. 343; 28 N. E. Rep. 175. Perhaps the principle is not better stated than in *Railroad Co. v. Williams*, *supra* (opinion by GILMORE, Ch. J.), as follows: "As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel or plank the road in such a manner as to make it most convenient and safe for use by the public for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man and beast and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner. He is taxed upon it; and, when the use or easement in the public ceases, it reverts to him, free from incumbrance. In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of

way for its road along and upon a public highway. * * * In such case, the rights of the public and the rights of the owner are entirely distinct; and the consent, express or implied, of one to the appropriation, would not bind or affect the rights of the other. * * * The railroad company, by occupying the highway, constructing its track and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use to which the highway has been diverted imposes burdens on the land that are entirely different from and in addition to those that were imposed by the highway. The right to so divert the use and impose additional burdens on the land could only be acquired by the corporation by agreement with the owner, or by appropriating and making compensation therefor in the mode prescribed by law." Applying the doctrine of this holding to the case at bar, it is manifest that the learned trial judge did not err in his charge bearing upon the property right of Mr. Taylor in the highway, but that, on the contrary, the law upon that subject was correctly stated to the jury; and, if right upon that point, the result would seem to follow, as further charged by the judge, that the landowner "had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company." The rule of law rests upon the clear ground that the appropriation of the public highways for the purpose of telegraph lines was a new use. The highways were originally dedicated for the purposes of public travel, and not for the purpose of telegraph lines. Hence the new use imposed an additional burden. The statutes of Ohio grant to telegraph companies secondary and subordinate, rather than co-ordinate, rights with travelers, which fact is apparent in the provision that the lines are to be so constructed as not to interfere with the public use of the highways. *Cincinnati Inclined Plane Ry. Co. v. Telegraph Assn.*, 48 Ohio St. 390; 27 N. E. Rep. 890. The presence in the statute of provision for the protection of private rights where lines are built on private lands, and the absence of such provision where the highways are used, is strong indication, as it seems to us, that the purpose was to avoid any interference with the rights of the adjoining landowners; and the conclusion seems inevitable, taking the language

of the entire statute upon the subject, that, whatever grant of right in the highways is given telegraph companies as against the public, no right is attempted to be given them as against individuals. The question of legislative power, therefore, to authorize a telegraph company to take the interest of the adjoining landowner in the highway without compensation, need not be considered. It follows that, before the telegraph company could possess a right in such measure as to interfere with the right of the landowner in the highway, it would be required to acquire that right in some one of the ways known to the law. It is not pretended that any such method has been resorted to. Hence the entry upon the land by the company was, as to such right, not a rightful entry. There was no error, therefore, in the trial judge giving the instruction upon that subject already quoted.

The court also said to the jury "that in doing these acts, if these men, in good faith, honestly thought from the circumstances that they had the right to cut the trees as they did, they could not, within the meaning of the law, be held to be guilty of a crime in this case, even though they had no right or lawful authority so to do. However, if you find they acted heedlessly, recklessly and carelessly, without honestly believing they had the right to do it, then, as to this branch of the case, they would be liable." And this is assigned as error, because, as is urged, if the defendants honestly, though mistakenly, believed they had a right to cut the trees, the question of recklessness would not enter into the consideration, and they could not be guilty. We see no error in this instruction to the jury. Indeed, it is probably more favorable to the defendants than they could well ask. If, with the information from Mr. Taylor as to his ownership of the land and of the trees, and in the face of his protest, they chose to go on and do the injury complained of, it was for the jury to say whether or not they acted "heedlessly, recklessly and carelessly," and if they did so act, then the cutting was "wrongful," within the meaning of the statutes. That the cutting, if it injured the trees, would inflict pecuniary injury on Mr. Taylor, was apparent on the face of things. The trees were of value to the enjoyment of the property. Not only as a matter of sentiment on the part the owner, who had planted them, and had watched their growth for near half a century, but as an improvement which added

money value to the farm, had Mr. Taylor an interest in preserving them from injury, and in invoking the aid of the criminal law, where the superior force of the telegraph company made it impracticable for him to personally protect his own. That too was the time for him to stand for his own. The right in the company, if it existed, to set poles as near as 130 feet from one another, with cross arms six feet in length, and to put upon them fourteen wires, implied the right to place the poles as near together as the company might desire, and to put on them cross arms of any length, and string a corresponding number of wires; and if there was the right to cut branches where necessary to the working of the line, there would arise an equal right to cut down the trees themselves in case a like necessity appeared. The landowner made resistance so soon as his property rights were directly assailed, but did not resist any too soon.

It is contended that the claim of the telegraph company to lawful possession as an instrument of interstate commerce is sustained by the holding of the Supreme Court in *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1. In that case it is held that the powers conferred upon congress to regulate commerce among the several states and to establish postoffices and post roads are not confined to the instrumentalities of commerce or of the postal service known or in use when the Constitution was adopted, but keep pace with the progress of the country, and were intended for the government of the business to which they relate at all times and under all circumstances, and it is the duty of congress to take care that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation; and, further, that the act of July 24, 1866 (section 5263 et seq.), which declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and is not limited in its operation to such military and post roads as are upon the public domain; and, as conclusion, that the statute of Florida, so far as it grants to the Pensacola company the exclusive right of establishing and maintaining lines

of electric telegraph as therein specified, is in conflict with that act, and, therefore, inoperative as against a corporation of another state entitled to the privileges which that act confers; and, further, that a telegraph company of another state, which has secured the right of way by private arrangement with the owner of the land, and duly accepted the restrictions and obligations required by that act, cannot be excluded by the Pensacola company. But this is very far from holding that a telegraph company which accepts the terms of the United States statute thereby acquires any right as against the individual property right of the citizen. True, the holding is that the telegraph is an instrument of interstate commerce; that telegraph companies are subject to the regulating powers of congress, in respect to their foreign and interstate business; and that such a company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. But how does this advance the argument? It is made plain, we think, by what has preceded, that the state cannot grant to a railroad company any right in a public highway which invades the individual right of the owner of adjoining land. Such right may be acquired by due process of law; it cannot be legally seized by brute force. It is to be noted, also, that the Western Union Company, whose right is vindicated by the decision cited, "had secured a right of way by private arrangement with the owner of the land," and hence the property rights of the citizen were in no way involved in the case. So solicitous, however, was the eminent jurist who wrote the opinion (Chief Justice WAITE) that no unwarranted impression should be created, that he took pains to guard against it, when speaking of the statute, by use of the following language: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges. * * * No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the

present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted." It is manifest that the case is not an authority supporting the contention of the plaintiff in error.

Beyond this, it is urged that by not resisting the erection of the poles and the stringing of the wires when the line was placed along the highway some ten years before, Mr. Taylor is in some way estopped from now asserting his private rights, and hence it could not be made a criminal offense to invade those rights. *Goodin v. Canal Co.*, 18 Ohio St. 169, is cited in support of this contention. The doctrine of the *Goodin* case was held in *Railroad Co. v. Robbins*, 35 Ohio St. 483, to "rest upon its own peculiar facts, and is not to be extended;" and in the recent case of *Railroad Co. v. Perkins*, 49 Ohio St. 331; 31 N. E. Rep. 350, it is again observed, respecting the same case, that "what is there said must be confined to the facts of that case." If, however, the doctrine of the *Goodin* case be at all applicable to the facts of the case at bar, it would only prevent a proceeding on the part of the landowner to compel a removal of the line. It could not work a transfer of the right of the landowner in the road to the telegraph company. That result, by reason of mere acquiescence, could not be accomplished short of twenty-one years. The private right, therefore, would not be extinguished; and, if not extinguished, that property right was still susceptible of protection by the criminal law. But, aside from this, even if the *Goodin* case applies here, why should the landowner be estopped? The holding in the *Goodin* case proceeds upon the theory that the owners must have been fully aware of the appropriation proceedings, and that their property was being seized and despoiled, and upon the additional fact that large sums had been expended on the faith of their apparent acquiescence. In the case at bar it is not shown that at the time of the erection of the telegraph line the danger of interference with or injury to private property was apparent, nor that expense has been incurred relying upon apparent acquiescence, nor, indeed, that any large sum has been expended at all.

Our conclusion is that the owner of the adjoining land was the owner of the trees, and had the right to their full enjoyment, subject only to the convenience of public travel; that his property in the trees was a legitimate subject of protection by state legislation, and that the criminal arm of the law was properly invoked for his protection. Other questions are argued, but we find none presented by the record of sufficient gravity to justify the use of time and space in their discussion. Judgment affirmed.*

Electric wires in streets—cutting shade trees to accommodate—rights of abutters.—A telephone company, invested with the power of eminent domain, and authorized by law to erect poles and stretch wires through the streets of a city, was required by ordinance to move its poles and wires from a street to the adjoining sidewalk. In doing so, it was necessary to trim certain trees, and this was done by the servants of the company, under the direction of a city officer. Held, that the company was not liable therefor to an action of trespass by the owner of the trees, since the act was done under lawful authority. *Southern Bell Tel. & Tel. Co. v. Constantine*, 9 C. C. A. 359; 61 Fed. Rep. 61.

As to the rights and remedies of abutting owners with respect to shade trees in front of their property, see, generally, *Chase v. City of Oshkosh*, 6 Am. R. R. & Corp. Rep. 1, and note.

In an action against a telephone company for tearing up plaintiff's sidewalk, and cutting a hole in his awning, for the purpose of setting a telephone pole, it appeared that defendant's manager placed the pole where he did with the consent of the city engineer and the mayor, and there was no evidence that he intended to act otherwise than in a lawful manner. It did not appear that either plaintiff or his tenant objected at the time, and the pole was removed soon after the action was brought. Held, that it was erroneous to allow exemplary damages. *Erie Tel. & Tel. Co. v. Kennedy*, 80 Tex. 71; 15 S. W. Rep. 704.

PITMAN v. CITY OF EL RENO.

(Supreme Court of Oklahoma, September 8, 1894.)

MUNICIPAL CORPORATIONS. INJURY FROM DEFECTIVE SIDEWALK. CONTRIBUTORY NEGLIGENCE. KNOWLEDGE OF DEFECT. Whether one injured while walking on a sidewalk at night, with knowledge that it is defective, and looking for the defect at the time, is guilty of contributory negligence, is a question for the jury.

* Reported in 37 N. E. Rep. 710.

Forest & Gunn, E. E. Jennings and W. H. Criley, for plaintiff in error. *D. W. Talbott, John I. Dillie and John Schmook, Jr.*, for defendant in error.

SOOTY, J. This is an action for damages for personal injuries alleged to have resulted from a defective sidewalk in the city of El Reno on the 12th day of September, 1893. Judgment for \$10,000 is prayed for. The case was tried in the District Court for Canadian county on the 14th day of December, 1893. The jury was impaneled on the 14th day of December, 1893, and the plaintiff introduced all his testimony and rested. Thereupon the defendant filed a demurrer to the evidence, which was sustained by the court. The case comes to this court on error. The only question necessary to consider is whether the court erred in sustaining the demurrer, discharging the jury and rendering judgment for the defendant. It appears from the testimony that the defendant in error is and was a city, duly incorporated, at the time the injury occurred; that Bickford avenue was, at the said time, the principal thoroughfare of said city, in daily use by the public; that on the west side of said avenue, between the streets of Woodford and Russell, at and before the time of the injury, there was kept and maintained a sidewalk; that in the month of September, 1892, and for a long time prior thereto, there existed in said sidewalk a defect, of which the defendant in error had due notice; that said defect consisted in an offset in said walk of about eight inches, and between the high and low walk there was a space of six or eight inches, not covered by plank or board, which space extended across the entire width of said walk; that on the 12th day of September, 1892, after dark, the plaintiff in error was passing along said street upon said sidewalk, and, while so passing, stepped into the said open space, and fell in such a manner as to badly bruise the muscles of the posterior portion of one of his legs, from which injury he suffered much pain, and was compelled to remain in doors for a period of about six weeks; that, at the time of the injury, he had full knowledge of the existence of said defect, and of its danger and the exact location; that the time of the injury was after night; that his vision was dim and impaired; that the defect was in a dark place in the street, where no light shone from the adjoining building; that,

at the time of the accident, the plaintiff in error was looking for and seeking to avoid said defect; that he had been for a long time passing along said walk every day, attending to his business — that of an hotel keeper.

The case, we think, turns on one proposition: Was there sufficient evidence to sustain the judgment for plaintiff in error, or, had a verdict in any amount, not excessive, been returned by the jury, could this court allow it to stand? If the evidence was insufficient to sustain a verdict in case one should have been rendered, then it follows that the court was correct in sustaining the demurrer. If, however, the testimony was sufficient, taking all as true, and drawing reasonable inferences therefrom, and excluding conflicting testimony, then it follows that the court erred in sustaining said demurrer, and the case should be reversed.

Did the plaintiff have the right to pass along said street and walk, knowing, as he did, of the existence and location of the defect? The principal case relied upon by the defendant in error is *Wright v. City of St. Cloud*, 54 Minn. 94; 55 N. W. Rep. 820, in which it is held that, since the injured person had a present knowledge of the defect, the corporation was not liable for the injury. We doubt the correctness of this doctrine as applied to the case at bar and, when the opinion is read, we hardly think the view, as a legal proposition, is maintained. In the case last cited, the defendant was a small town in the northern country, and the action was for injury in falling on a path over a portion of sidewalk, which had not been properly cleared of snow and ice. The plaintiff knew, in that case, that the place was dangerous, and was herself to blame for exposing herself in that manner. The court, in the opinion, seemed to circumscribe itself, for fear of imposing too great a burden upon small towns, in that climate, in keeping the walk clear in remote parts of the town, and thus held that the person injured was guilty of negligence per se. In the text of the opinion, we find the following language: "The general, if not the universal, doctrine is that the duty of a city to exercise reasonable care to keep its sidewalks in safe condition for travel is not limited to structural defects, but extends also to dangerous accumulations of snow and ice. This is implied, if not decided, in *Henckes v. City of Minneapolis*, 42 Minn. 530; 44 N. W. Rep. 1026. In this climate and in this new state the duties of cities,

with respect to ice and snow, must necessarily be somewhat limited, and care should be taken that they be not held to a degree of diligence beyond what is reasonable, in view of their situation. What reasonable care might require in a milder climate or in an older country, where cities are more compactly built, might be too high a standard in this climate for new cities, often embracing within their limits much territory that is more rural than urban." The other cases cited by defendant in error are decided upon the same theory. In the case of *City of Centralia v. Krouse*, 64 Ill. 19, the court used the following language: "Having undertaken to go where he knew it was positively dangerous, it must be held that he did so at his own peril. It was in daylight, and he could see that the walk was full of danger holes, and was all covered with snow and ice, and it was culpable negligence in him to undertake to pass over it. It was probably dangerous for any one, and it was highly imprudent in one so far advanced in life, to undertake to pass over the walk in its then condition, and covered, as it was, with snow and ice." Another case, seeming to sustain the theory of the defendant, is that of *Durkin v. Troy*, 61 Barb. 437, where it is held: "Now, the foundation of the plaintiff's cause of action, if he had one, is that this piece of ice was a dangerous obstruction to the passage of those using the sidewalk for that purpose, which the city was bound to remove, and the danger consisted in the liability of those who stepped upon it to slip and fall. The obstruction was, therefore, one to be avoided by those using the sidewalk, and seeing or being able to see the ice; and, if it could readily be avoided, the failure to avoid it, by one seeing the sidewalk, and plainly seeing the obstruction, must be accounted negligence." In these cases it seems to be the theory of the court that sidewalks covered with snow and ice are actually dangerous, and in this they are probably correct. There is a difference, however, between a defective place, which may result in injury, and one which is so dangerous that passing over it is nearly certain to result in injury. If the action of the plaintiff in error would, in the usual course of events, have resulted in injury, the court very properly sustained the demurrer. Contributory negligence is nothing more nor less than negligence on the part of the person injured, and the rules of law applicable to negligence of a defendant are appli-

cable thereto. Beach Contrib. Neg. 161. The fact that a person attempts to travel on a street or sidewalk after he has notice that it is unsafe or out of repair is not necessarily negligence; but, of course, one cannot needlessly or recklessly run into danger. Corlett v. City of Leavenworth, 27 Kans. 675. If a person attempts to pass over a sidewalk, bridge or other structure, knowing the same to be in a dangerous condition, and, in such attempt, receives injury, his knowledge of the danger will, presumptively, establish contributory negligence; but such presumption is not conclusive. Olsen v. City of Chippewa Falls, 71 Wis. 558; 37 N. W. Rep. 575.

In the case at bar the walk was a public thoroughfare, used by the entire public daily; and we think the public was not bound, because of a mere defect in the walk, to go around the block to avoid it, or even to go on the other side of the street. We think all that is necessary in such a case is for the person passing such place to use ordinary care and caution to avoid being injured. In other words, we cannot think that the action of the plaintiff in error in passing along the same street used by other people continuously, and one which he was accustomed to use daily himself, without injury, was negligence per se; and, when he simply used the same walk others did, it is a question, to be found from the evidence, if his injuries resulted from his own negligent acts at the time of its occurrence. In the case of City Council of Montgomery v. Wright, 72 Ala. 411, we find the following language, which seems directly in point: "It would seem legal truism to say that it could not be deemed a want of ordinary care for the plaintiff to do what all other persons, similarly circumstanced, were in the constant habit of doing, without accident or injury to themselves, as far as is disclosed, which is set out in the bill of exceptions. There was ample room for the plaintiff to have safely passed between the fence and the washout, and his familiarity with the existence of the defect may have been an argument, in his own mind, inducing him to believe that he could pass it in safety. The possession of a walking cane, with which he seemed to have felt his way along when approaching the defective place, was a circumstance also favorable to the prospect of his safety. The plaintiff could not, we repeat, have been guilty of a want of ordinary care, prima facie, in selecting a route which was ordinarily traveled

with safety by all pedestrians going in the same direction. If he was guilty of contributory negligence at all, it was not in selecting the route, but in the want of care exercised in the act of walking after he had made the selection." In the case at bar the evidence shows that, at the time of the injury, the plaintiff in error was not only using ordinary care, but he was carefully seeking to find the defect. In the case of *Maultby v. City of Leavenworth*, 28 Kans. 747, Judge BREWER, speaking for the court, announces what we take to be the correct rule: "And upon this we remark, in the first place, that the mere fact that the plaintiff knew the sidewalk was defective did not prevent him from using it. The logic of a converse proposition would be this: That if all the sidewalks in a city are defective, and all the citizens are aware of it, no one could use a sidewalk except at his own peril. The city would then absolve itself from all liability by making known its omission of duty. This is not the law. A city must discharge its duty of making its streets and sidewalks reasonably safe for public travel; and it does not necessarily release itself from liabilities to a traveler injured thereon by mere proof that such traveler knew the condition of the street or sidewalk. As we said in the case of *Corlett v. City of Leavenworth*, 27 Kans. 673: 'The fact that a person attempts to travel on a street or sidewalk after he has notice that it is unsafe or out of repair is not necessarily negligence.' Now, in this case the plaintiff was intent on business. While he knew the condition of the sidewalk, he was cautious in his actions. Ordinarily, a person is not obliged to forsake the sidewalk, and travel in the street; for, while thereby he could avoid one kind of risk, he would expose himself to another, to wit, that of injury from passing vehicles. Besides that, the condition of a street on a rainy night is not such as to invite the steps of one traveling on foot. Neither is a party, although he is aware of the condition of the sidewalks, necessarily obliged to go around the block or travel by another street."

In a late case (*Village of Clayton v. Brooks*, 150 Ill. 97; 37 N. E. Rep. 574) this question is fully discussed, and nearly the entire field of authority thereon is reviewed. The proposition would seem to be forever put at rest in this country on this authority. The court, in this case, say: "Walking on a defective side-

walk at night, with knowledge that it is defective, is a circumstance tending to show negligence, but is not conclusive proof thereof. *City of Aurora v. Dale*, 90 Ill. 46, followed."

Another strong case recently decided is *Town of Fowler v. Linquist*, (Ind. Sup.) 37 N. E. Rep. 133; HOWARD, Ch. J., delivering the opinion. In the opinion in *Village of Clayton v. Brooks* we find this language: "The mere fact that a traveler is familiar with the road, and knows the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it.

* * * Such knowledge is a circumstance and perhaps a strong one; but it should be submitted with the other facts of the case, to a jury for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury. * * * But the mere fact that the obstructed street was out of the way of the point at which the traveler was aiming, or that he might have taken a nearer way, is immaterial, as it is the duty of the town to repair all the streets." *Shear. & R. Neg.* § 376. See, also, *Erie City v. Schwingle*, 22 Penn. St. 384; *Whittaker v. West Boylston*, 97 Mass. 273; *Morrill, City Neg.* 139. Nor does the mere fact that the plaintiff might have taken better and safer sidewalks than the one he did take charge him with want of ordinary care. *City of Aurora v. Hillman*, 90 Ill. 61. The fact that a person injured by reason of a defective street could have taken another road is no defense to an action against the town. 37 N. E. Rep. 133, *supra*.

In *Osage City v. Brown*, 27 Kans. 74, an action against the city of Osage City to recover damages resulting from a defective sidewalk, the plaintiff recovered \$550, and the city of Osage City took the case to the Supreme Court, and alleged, among other errors, that the plaintiff was guilty of contributory negligence, and, therefore, not entitled to judgment. It was alleged that, just prior to the injury, plaintiff was engaged in the business of teaming in said city; was near seventy years old; had occasionally traveled on foot over the defective sidewalk when going to the Masonic lodge or when out trading. On the night of the injury he was on his way to the lodge; the night was cloudy and consequently dark; he was a little late, and walked somewhat briskly. His foot caught in the rise or offset which was not

covered, and held him so that he fell. The court then say: "From these facts such negligence is not perceived on the part of the injured person as to prevent a recovery." The trial court instructed the jury "that every person passing over the sidewalk of a city is required to exercise such care and diligence in doing so as men of ordinary care and diligence would use under similar circumstances. In determining whether plaintiff used such care at the time he received the injury complained of, it would be proper to consider his knowledge of its condition, the time, the light or darkness at the time and place the injuries were received, and his manner of traveling, and any other facts appearing from the evidence that would tend to show such care or want of it," and further charged them that, if they found from the evidence that the plaintiff materially contributed to such injury by such negligence, they would find for the defendant. The court say: "This instruction, given by the trial court, was the true declaration of the law."

Upon the facts in proof in the case at bar, the court below unquestionably erred in finding from the evidence, as a matter of law, that the plaintiff in error could not recover, and in rendering judgment for the defendant. The demurrer should have been overruled, and the jury called to assess the damages, under an instruction from the court that, upon the facts proved, the plaintiff in error was entitled to recover; or, under the authority, the court itself could have assessed the damages. *Lindley v. Kelley*, 42 Ind. 294; *Strough v. Gear*, 48 Ind. 100. This is the Indiana rule, and, as the Code of that state was in force in this territory at the date the action was instituted, it is applicable, and should be observed in this case. The cause will be remanded to the court below, with instructions to assess the damages in accordance with this decision. It is so ordered. All the justices concurring.*

1. Injuries from defective sidewalk—contributory negligence—knowledge of defect.—In an action for personal injuries caused by a defective sidewalk, contributory negligence of the plaintiff will not be presumed from his knowledge of the existence of the defect, nor will his use of the sidewalk under such circumstances preclude his recovery; but such knowledge

* Reported in 87 Pac. Rep. 851.

enjoins upon the plaintiff a degree of care commensurate with the danger, and is admissible as tending to show contributory negligence. *City of Sandwich v. Dolan*, 141 Ill. 480; 81 N. E. Rep. 416; *Village of Clayton v. Brooks*, 150 Ill. 97; 87 N. E. Rep. 574; *Town of Poseyville v. Lewis*, 126 Ind. 80; 25 N. E. Rep. 596; *Norwood v. City of Somerville*, 159 Mass. 105; 33 N. E. Rep. 1108; *Finn v. City of Adrian*, 98 Mich. 504; 53 N. W. Rep. 614; *McGrail v. City of Kalamazoo*, 94 Mich. 52; 53 N. W. Rep. 955; *Dittrich v. City of Detroit*, 98 Mich. 245; 57 N. W. Rep. 125; *Flynn v. City of Neosho*, 114 Mo. 567; 21 S. W. Rep. 903.

While it is certain that previous knowledge of the existence of a defect in a street or sidewalk has an important and oftentimes a decisive bearing upon the question of contributory negligence, mere inattention on the part of a person injured by reason of such defect will not conclude him upon that question. It is not necessary that the thoughts of a traveler should at all times be fixed upon a defect in a public thoroughfare, of which he may have had notice. *Maloy v. City of St. Paul*, 54 Minn. 398; 56 N. W. Rep. 94.

If a person, with full and present knowledge of the defective condition of a sidewalk, and of the risks incident to its use, voluntarily attempts to travel upon it, when the defect could easily and without appreciable inconvenience have been avoided by going around it, he is not in the exercise of reasonable care, but must be presumed to have taken his chances, and if injury results he cannot recover from the city. *Wright v. City of St. Cloud*, 54 Minn. 94; 55 N. W. Rep. 819.

Where a person knew that a bridge was in a dangerous and unsafe condition, and yet undertook to drive over it without apparent necessity, it was held that he was guilty of contributory negligence and could not recover. *Cohen v. City of Coffeerville*, 69 Miss. 561; 13 South. Rep. 668.

In an action against a county to recover for injuries sustained by being thrown from a buggy by a patent defect in the highway, where it appeared that plaintiff deliberately and carelessly, seeing the defect, drove over it, or that her failure to see it was the proximate cause of injury, she cannot recover. *Magill v. Lancaster County*, 39 S. C. 27; 17 S. E. Rep. 507.

Where signboards bearing in large letters the inscription "Bridge unsafe" are placed conspicuously at each end of a defective bridge, and are of such construction as to give warning of the unsafe condition of the bridge, the fact that a traveler is unable to read English does not excuse his attempting to cross the bridge, and in doing so he is guilty of contributory negligence. *Weirs v. Jones County*, 86 Iowa, 625; 53 N. W. Rep. 821.

FIELD ET AL. V. BARLING ET AL.

(Supreme Court of Illinois, April 2, 1894.)

1. MUNICIPAL CORPORATIONS. POWER TO GRANT USE OF STREETS FOR PRIVATE PURPOSES. BRIDGE OVER ALLEY. An ordinance granting to private parties the right to construct for their own use a bridge over a public alley is invalid, since cities hold the fee of the streets in trust for public uses only.

2. RIGHT OF ABUTTING OWNER TO ENJOIN PRIVATE ERECTIONS OVER ALLEY. SPECIAL DAMAGE. Where a proposed obstruction in a public alley inflicts special damage on the owner of an adjoining lot, he is entitled to an injunction restraining its erection.

3. Where the answer to a bill to enjoin the erection of a bridge across a public alley admits an intention to erect the bridge, and describes it specifically, and it appears that defendants have no right to erect any bridge in such alley, it is proper to enjoin them from erecting any bridge across the alley, without limiting the injunction to the particular kind of bridge proposed to be erected.

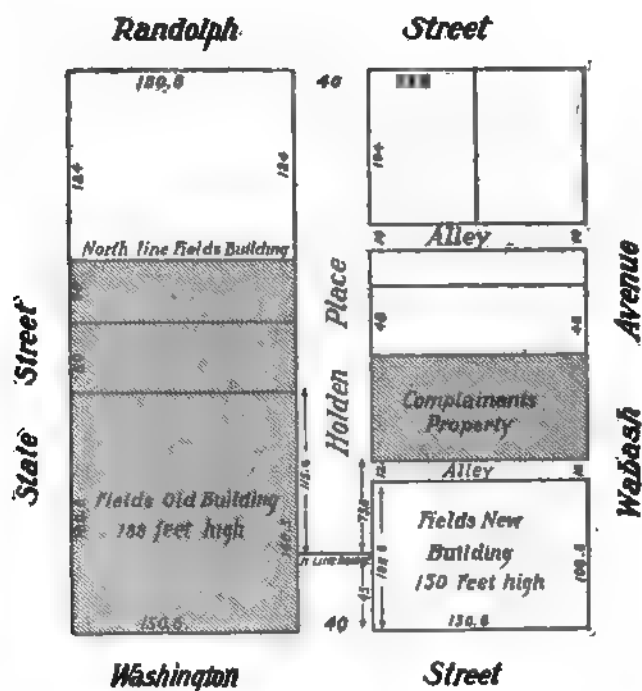
4. RIGHTS OF ABUTTING OWNERS IN PLATTED STREETS AND ALLEYS. Where land is platted by the owner into lots, blocks, streets and alleys, and lots are sold by him with reference to the plat, the purchasers acquire, as appurtenant to the lots, the right to have the adjoining streets and alleys kept clear of obstructions both on and above the ground.

BILL for injunction brought by Henry A. Barling and others against Marshall Field, John M. Pashley and others. Complainants obtained a decree. Defendants appeal.

Wilson, Moore & McIlwaine, for appellants. *Geo. L. Paddock* (*John J. Herrick*, of counsel), for appellees.

CRAIG, J. This was a bill brought by Henry A. Barling, Edward H. Green and Edward D. Mandell, trustees under the will of Edward Mott Robinson, deceased, against Marshall Field et al. to enjoin them from building or constructing any building, bridge, passageway or other construction on, upon or across the alley known as Holden place or court, between the north line of Washington street and complainants' property described in the bill. The block in the city of Chicago bounded by Wabash avenue, Randolph, State and Washington streets, is known as block 13 of Ft. Dearborn addition to Chicago. The land, when platted, belonged to the United States, and the plat of Ft. Dearborn addition was executed and recorded in June, 1839. The following plat shows State street, Washington street and Wabash

avenue, and Randolph street as originally laid out; also Holden place. The plat also shows the location of complainants' property, and the location of Field's old building, and the new one, and the point where it was proposed to erect the bridge across Holden place, connecting the two buildings.



Holden place, as will appear from the plat, is forty feet wide, extending north and south, through blocks 13 and 14, with lots on each side; those on the east fronting on Wabash avenue, those on the west fronting on State street. Holden place has been used as a public place or street for many years. The defendants' lots on the northeast corner of Washington and State streets, have a frontage of 160 feet on State, extending back to Holden place, covered by a six-story building, occupied by Marshall Field & Co. for several years as a dry-goods house. The defendants have acquired lots on northwest corner of Wabash avenue and Washington street, with a frontage of 108 feet on Wabash avenue, extending back to Holden place. On the latter lots the

appellants commenced the erection of a new building, nine stories high. At the time of the filing of the bill the new building had been erected six stories high, and the appellants were about to commence the erection of a bridge or passageway over Holden place, connecting the old and new buildings. The bridge or passageway, as disclosed by the answer, was to be eighteen feet above the surface of Holden place, three stories in height, extending north from Washington street over the alley, the entire width of the alley, the distance of forty feet and upward, fifty-five feet or seventy-three feet above the ground.

It is charged in the bill that "the effect of said construction of such connecting building, if the same be not prevented by this honorable court, will be to deprive your orators' said building and the occupants thereof, to a great extent, of sunshine, light, air and warmth, which they have hitherto enjoyed, by reason of the opening and keeping open of said court or alley from the time of said platting and subdivision down to the present; will give said alley an appearance of a private gateway and passage; will hinder and deter traffic, and in many other ways cause serious and continuing damage to your orators and their property; that such damage will amount to many thousands of dollars, and will be beyond legal remedy or relief, if not prevented by this court." It is also alleged that orators and Marshall Field & Co. and the other defendants held their respective lands on said block 13 under a common source of title, viz., the United States, by patents made by the United States in pursuance of a subdivision plat and sales by the United States; "that by reason of the exhibition and publication of the said subdivision and plat, and by the sale of lots thereunder to the respective grantors of your orators and the said defendants Marshall Field & Co., or said Marshall Field, for their use, there has resulted, as between your orators and the said Marshall Field & Co., or such of them as own the said properties so fronting south on Washington street, on either side of said alley, a right in law to have the said alley remain absolutely and wholly open forever, of the same dimensions and to the same extent as delineated by the United States upon the subdivision and plat aforesaid, viz., from the north line of Washington street, forty feet in width, to the south line of Randolph street, and upwards to the sky." In the answer

the appellants admit the intention to build the proposed bridge or structure over and across Holden place, but deny that it will interfere with the light, air and ventilation of complainants' premises, or that it will in any manner injure complainants. The appellants also set up and rely upon an ordinance set out in complainants' bill, passed by the city of Chicago June 6, 1892. Section 1 of the ordinance is as follows: "Be it ordained by the city council of the city of Chicago: Section 1. That permission and authority be and is hereby given to John M. Pashley and his assigns to construct and use a bridge or covered passageway across the alley running between lots 9, 10 and 11 on one side, and lot 6, in assessor's subdivision of lots 6, 7 and 8, etc., on the other, all in block 13, Fort Dearborn addition to Chicago; provided, the lowest portion of said bridge or passageway shall not be lower than eighteen feet above grade of alley, and shall be so constructed that free and unobstructed passage may be had under the same; and provided, that said bridge or passageway shall be constructed of incombustible material and to the satisfaction of the commissioner of buildings." Section 2 provides that Pashley, or his assigns, and all persons who shall occupy the buildings which the bridge is to connect, shall indemnify and save the city of Chicago harmless from all damages which it may become liable for by reason of the passageway granted.

It will not be necessary to cite authorities in support of the proposition that a private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use. Before Holden place was dedicated to the public as a street, the title of the United States, the original proprietor, was not confined to the surface of the ground, but its title extended upward, embracing the light and air as well as the soil; and the dedication of the strip of land for a public street embraced not only the surface of the ground, but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil. In *Barnett v. Johnson*, 15 N. J. Eq. 481, where it was proposed to obstruct light and air over ground dedicated to the public, it is said: "When the strip of land is declared a public highway, the adjoining owner has the right to light and air from it. The column of light and air above the roadbed, whether of

land or water, is as much a part of the highway as the roadbed itself. Take them away and there would be left no public passage. By its being declared a highway by the sovereign power, the light and air above it become again the common property of all, which all may breathe and use whenever they may legally touch it, whether in the road or along its sides. * * * When cities and villages have been built up along a public highway, the right to light and air from it becomes vested, and even the legislature would have no more right to deprive them [abutting owners] of it without compensation than they would have to draw off the water from a navigable stream."

But the city of Chicago passed an ordinance which purported to authorize the construction of a bridge or passageway, and it becomes competent to argue in what manner the ordinance affected the rights of the parties in interest. The ordinance does not purport to grant the right for any public purpose. The use to be made of the street is a private one, solely for appellants' benefit in the transaction of their private business. Clause 7, section 62, chapter 24, Revised Statutes, confers power on cities organized under the General Incorporation Act, as is the city of Chicago, to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharfs, parks and public grounds, and vacate the same; but there is nothing in this section of the statute, or in any other portion of the General Incorporation Act, which confers the power on the municipality to devote a street, or any part thereof, to a mere private use. By the making of the plat in conformity to law, there was a statutory dedication. The fee of the street passed to the city of Chicago, but the city held the fee in trust for the public, and for no other purpose. While the city had ample power to control, regulate and improve the street in such manner as the demands of the public required, the law conferred no authority on the city to devote the alley to private uses. In the case of *Smith v. McDowell*, (Ill. Sup.) 35 N. E. Rep. 141, where a city passed an ordinance to vacate a portion of a street for the purpose of allowing a private individual to use that portion for a part of a building about to be erected, it was held that the city had no power to devote the streets to that purpose. It is there said: "The municipality, in respect of its

streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it. In *Alton v. Transportation Co.*, 12 Ill. 38, we said, in treating the subject there under consideration: 'Whatever title to these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them.' At most she but holds them in trust for the benefit of the general public.' In *City of Quincy v. Jones*, 76 Ill. 231, after quoting with approval the foregoing language, it is said: 'It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use as streets, * * * as the public necessity may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the streets which might in any way interfere with the duty of preparing them for public use.' And in *Canal Co. v. Garrity*, 115 Ill. 155; 3 N. E. Rep. 448, in considering the power of the municipality to grant rights in the public streets of the city, it was said: 'It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize as unquestionable law that the use of the streets * * * must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them, for private purposes.' In *Glasgow v. City of St. Louis*, 87 Mo. 678, under power 'to establish, open, vacate, alter, widen, extend, pave or otherwise improve all streets,' etc., it was held that an ordinance to vacate a portion of one of the streets of the city for the use of private parties was *ultra vires*. See, also, *Reimer's Appeal*, 100 Penn. St. 182; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. 108; *State v. Berdetta*, 73 Ind. 185; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 127; *Dubach v. Railroad Co.*, 89 Mo. 486; 1 S. W. Rep.

86. And we held that the city cannot acquire land by condemning the same for a street when the real purpose is to devote it to a private use. *Ligare v. City of Chicago*, 139 Ill. 46; 28 N. E. Rep. 934, *supra*. In *Belcher Sugar Refining Co. case*, *supra*, the court held that the corporation could not condemn property for a public use to be appropriated to a private use."

But it is claimed that appellees are not entitled to a decree unless they allege and prove they would sustain a special and substantial injury. It is conceded that both parties in this case derive title to their lots from a common source — the original proprietor of Kinzie's addition; that the conveyances were made with reference to the plat; that the streets and the alley in question, Holden place, all appear on the plat. It is claimed on behalf of appellees that where the owner of lots exhibits a plat of a town or addition on which a street has been laid out and dedicated, and sells and conveys lots abutting on such street with a clear reference to the plat, the purchasers of such lots acquire, as appurtenant to their lots, the right to have the street kept open and maintained as a street. In *Zearing v. Raber*, 74 Ill. 409, where a similar question arises, the court quotes from and indorses what is said in *Dovaston v. Payne*, 2 Smith Lead. Cas. (7th ed.) 154, as follows: "If the owner of land lays out and establishes a town, and makes and exhibits a plat of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plan represents as belonging to them as part of the town, or to their owners, as citizens of the town; and the right thus passing to the purchasers is not the mere right that such purchaser may use these streets, or other public places, according to their appropriate purposes, but a right vesting in the purchasers that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use." In *Earll*

v. City of Chicago, 136 Ill. 277; 26 N. E. Rep. 370, the above case is quoted with approval, and the same doctrine is announced. In Town of Lake View v. Le Bahn, 120 Ill. 92; 9 N. E. Rep. 269, where a lot owner filed a bill to enjoin the town from prosecuting him for an alleged obstruction of a strip of land in what was deemed to be a platted street, on the ground that the dedication was invalid, the court directed the dismissal of the bill, and, among other things, said: "Each block was thus [by the plat and conveyance with reference to it] burdened with the easement of a street upon a strip of land thirty-three feet wide around it, and entitled to the benefit of the easement of a street of like width upon the adjoining side of the opposite block, so far as there was a block opposite, thus making a street sixty-six feet wide around each block. * * * In taking the several blocks of land with the arrangement of this system of streets, there were implied mutual agreements that the streets should ever remain as platted — a dedication to the public use of the ground laid out as a street, as effectual as could have been made by deed solemnly executed. * * * He [the adjoining lot owner, claiming to the center of the street] took and held an estate upon the condition of its being burdened with the easement of the streets, and the public authorities, on opening and improving the streets, act as for the representatives of the lot owners with others in so doing." Newell v. Sass, 142 Ill. 114; 31 N. E. Rep. 176, is also a case in point. There a bill was filed by a lot owner to enjoin the owner of another lot in the same subdivision from obstructing an alley. The defendant set up, among other things, that complainant was not injured; that she had no right to an injunction, and that there was a remedy at law. In the decision of the case it was, among other things, said: "Appellants invoked, as against this decree, the rule that equity will only interpose to prevent a threatened nuisance where the injury will be irreparable, where the complainant's right is clear, and where proof of the facts upon which the complainant rests is of the most convincing character. There is no question as to the character of the act threatened, and complainant's right does not seem to be seriously contested. * * * The execution of the plat under which complainant claims her easement, and the sale of the lots afterwards, in conformity therewith, are clearly proven. * * *

Appellants seem, at the time of filing the answer, to have been under the impression that appellee could derive no rights under the plat unless it had been accepted by the city or the public, and hence denied that there ever had been such acceptance. But appellee's right is established by showing that she owns an easement — the right of passage — incident to her ownership of her lot. * * * It is not necessary, in such case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial therefor. *Cihak v. Klekr*, 117 Ill. 643; 7 N. E. Rep. 111. * * * 'Irreparable injury,' as used in the law of injunction, does not necessarily mean 'that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law, the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one.' *Elliott Roads & S.* 497. * * * And this court has, in harmony with these authorities, held that injunction will lie to prevent obstruction to a private way, on the ground that the party has no adequate remedy at law. *McCann v. Day*, 57 Ill. 101." The same rule has been adopted in other states. In *Dill v. School Board*, (N. J. Ch.) 20 Atl. Rep. 739, an injunction at the suit of a lot owner was sustained restraining an obstruction of the light and air from an alley dedicated by plat. In the decision of the case it is said: "The right to have the alley thus described forever preserved as a street is a private right, annexed as an appurtenant to the ownership of the land conveyed, and is entirely distinct from and in addition to the rights of the owner as a citizen at large to use the street after it should become a public street by acceptance by the public authorities. But, while it is a private right, it is, in my judgment, co-extensive with the public right just mentioned, in that it goes the length of requiring that the alley should be preserved in all respects as if it were actually a public street." See, also, *Story v. Railway Co.*, 90 N. Y. 123; *Salisbury v. Andrews*, 128 Mass. 336; *Schwoerer v. Boylston Market*, 99 Mass. 285.

We do not understand that appellees' right to have Holden place kept free and clear of all obstruction rests on any personal

covenant of the appellants, although that expression may be found in some of the cases; but when the original proprietor of the subdivision made the plat dividing the land into blocks and lots, streets and alleys, and sold and conveyed the lots with reference to that plat, a right arose in favor of the purchasers of lots fronting on Holden place of having the street forever kept open; not that it should be kept free from obstruction on the surface of the soil alone, but to the sky. No grant or covenant was required to create this right. The dedication of the street by the plat, the sale of lots with reference to it, conveyance of abutting lots and the payment of the money for the conveyances were elements sufficient to create the right. The right may be regarded in the nature of an incorporeal hereditament. It became appurtenant to the lots. As to the rights secured, they are plain — to have the street kept open, so that free access may be had to and from the lots abutting on the street, and that light and air may pass unobstructed across the open space between the surface of the street and the sky. Whether this right extends to all the streets in a subdivision, or is confined to streets which afford direct access to or egress from a particular lot, is a question which does not arise in this case. Here appellees' lots front on Holden place, and the obstruction is placed in the street between appellees' lot on Washington street, at a point affording the only means of access to and from Washington street, from which also light and air are derived. We have been referred in the argument to *McDonald v. English*, 85 Ill. 232, and many other cases of that character, holding, as to obstructions in streets not resulting in special injury to the individual, the public only can complain. Under the facts as they appear in *McDonald v. English*, we find no fault with the law as laid down in that case, and the same may be said of other similar cases cited by counsel. But in those cases the question presented by the record in this case did not arise. No question arose in regard to the effect of a plat and conveyance in reference to the plat, and the rights and obligations of lot owners who had purchased with reference to streets and alleys appearing on the plat, and no such question was considered or decided.

One other question remains to be considered, and that is whether the erection of the proposed structure will result in

special damage to appellees' property different in character from that sustained by the public at large. The proposed bridge or structure, as has been seen, was to be built from a point eighteen feet above the surface of the alley, fifty-five feet high and forty-five feet wide, extending from the north line of Washington street to within seventy-five feet of the south line of appellees' building. The character of the structure, as disclosed in the answer, is as follows: It will be built of steel, supported by steel and cast-iron columns of the old and new buildings. The columns in both buildings, the steel girders and the steel beams in all floors will be fireproofed with hard-burned fire clay. The north and south walls will be of terra cotta, and the roof covered with three-inch book tile of fire clay. The roof will be framed heavily, like a floor, and the fire clay supported on "T" irons, on eighteen-inch centers. The windows on the north side will be protected with rolling-steel shutters. Each wall on each story will be practically a continuous window, so as to intercept light as little as possible. In view of the size and character of the structure erected over the entire street, a main entrance to appellees' property for the transaction of business, and so near the property it would seem that much additional evidence could not be required to establish that appellees would sustain special damages. But evidence was introduced tending to prove that the obstruction would seriously interfere with the light and the circulation of air at appellees' building. R. W. Hyman, a real estate agent in Chicago, of many years' experience, who was well acquainted with this property, testified that the erection of the structure would materially diminish the amount of air and light passing into said alley, and of the light and air derived by complainants' said building from said alley, and would darken and impede the approach to said building from Washington street by said alley, and in different ways would prevent the public from entering said alley as a means of access to said building from Washington street; that the erection and maintenance of such a structure will, in affiant's opinion, materially damage said complainant's property, and materially diminish its rental and other value; and that the damage to said property and its value will be continuous, and of such a character that it is not practicable to estimate the amount of the same with accuracy.

Other evidence of a similar character was introduced; and, on the other hand, there was evidence that appellees' property would not be damaged, but would be benefited. But, from an examination of all the evidence, we are satisfied that erection of the structure would result in serious damage to appellees' property, different in character from that sustained by the public.

In the bill of complaint it was alleged that appellants intended to construct a certain bridge or passageway connecting the old and new buildings, which was described according to the information shown in the possession of the appellees. The answer of appellants admitted the intention to build the proposed bridge or passageway for the purpose alleged, and described in detail the particular structure proposed to be built, giving the location, the height, width and other dimensions of the proposed structure, but denied appellees' right to an injunction. The court, on the hearing, rendered a decree enjoining appellants from construction of any bridge across Holden place, and it is claimed the decree should have been confined to the particular kind of a bridge described in the answer. The object of the bill was to prevent the threatened injury, and a decree confined to a bridge or passageway of some particular description or dimensions might have opened the door to litigate this whole controversy over again, by an attempt on the part of appellants to construct a bridge a foot narrower, or two feet lower, or varying slightly in some other respect from the bridge first contemplated. If, under the facts presented by the record, appellees were entitled to an injunction to prevent the threatened obstruction, as we think they were, it was the duty of the court to render a decree which would settle the controversy; and we think the decree rendered was the proper one, and it will be affirmed. Affirmed.*

1. Power of municipal corporation to grant use of street for private purposes—awnings.—In *Pedrick v. Bailey*, 12 Gray, 161 (1858), it was held that an ordinance prohibiting the erection and maintenance of awnings, without the consent of the mayor and aldermen, was a valid police regulation, and that an awning erected without such permit might be summarily removed by the city authorities. In *Hawkins v. Sanders*, 45 Mich. 491, it was held that an awning was not a nuisance per se.

* Reported in 149 Ill. 556; 37 N. E. Rep. 850.

Under the New York Consolidation Act (Laws New York, 1882, chap. 410), section 86, which authorizes the common council to make ordinances, not inconsistent with law, to prevent encroachments on and obstructions to the city streets, and to regulate the use of streets and sidewalks for signs, awnings and other purposes, the council may by ordinance authorize the erection and maintenance of awnings over the sidewalks. *Hoey v. Gilroy*, 129 N. Y. 132; 29 N. E. Rep. 85. An ordinance which provides that awnings of tin or other light metal may be erected across the sidewalks of the city, to be supported on iron posts not more than six inches in diameter, placed just inside the curbstone, is sufficient to authorize the construction of a permanent iron structure 110 feet long and 19 feet wide, covering the entire sidewalk, and extending over the curbstone about a foot, the roof of which is made of light corrugated iron, and is supported by iron columns three and one-half inches in diameter, placed twelve feet apart, just inside the curbstone, and imbedded in the ground. *Ibid.* In this case the suit was brought by the president of the Adams Express Company to enjoin the defendants, who were the officers having charge of the city streets, from removing the awning in question. There appears to have been no action of the council in the matter, but the proposed removal was on the responsibility of the commissioner of public works alone. The Court of Appeals held that while the awning was an obstruction to the street, it was a legalized obstruction, and could not be removed without the action of the council, and the relief prayed was granted. It was said, however, that "the common council can at any time abate such obstruction, and prevent them in the future by a repeal or modification of the ordinance."

City Council of Augusta v. Burum, (Ga.) 19 S. E. Rep. 820, was also a case to prevent, by injunction, the removal of awnings by the city authorities. The city had no express authority to authorize or license awnings or similar obstructions, but it had express authority to prevent and remove encroachments upon the street. The city, however, had expressly authorized awnings and regulated their construction. Subsequently such authority was revoked and all wooden awnings were ordered to be removed. The points decided are thus stated in a syllabus prepared by the court. 1. As the municipal government could not, in the absence of express legislative authority, grant the right to erect and perpetually maintain awnings over the sidewalks of the city, the rightful existence of such awnings can be accounted for only upon the assumption that they were erected under a license, express or implied, from such government; and, however long they may have been in existence, their continuance must be referred to the original license, or to a renewal or repetition of the same. No lapse of time will render the license irrevocable, but there would be an equitable estoppel against a needless or capricious revocation until sufficient time had elapsed, after the expense of erecting the structures was incurred, to allow those who incurred such expense to realize, in the way of use and enjoyment, a fair return for their outlay. Whenever such time has elapsed, the license to continue the structures may be revoked; and unless, after reasonable and fair warning, they are removed by the owners, the city authorities may remove them as encroachments upon the streets, no longer authorized. 2. Where the awnings in question have existed

from nine to more than twenty years, the fair presumption, there being no evidence to the contrary, is that those who erected them have been compensated by their use for all expenditures made upon the faith of the license granted. An ordinance revoking the license is, consequently, *prima facie* valid, and its enforcement should not be enjoined.

2. Granting right to place private scales in street.—An incorporated town has power under Code Iowa, section 456, authorizing it “to provide for the measuring or weighing of hay, coal,” etc., to grant to individual dealers the right to set scales in the public streets in front of their places of business in such a way as not to be an obstruction to travel. *Town of Spencer v. Andrews*, 82 Iowa, 14; 47 N. W. Rep. 1007. Though the right so granted was a mere license and revocable as such, yet where it appeared that before the revocation the licensees had ordered a scale suitable to the place; paid the freight thereon; that some of the grading had been done; that they had enlarged the plan of their building so as to make room for the scale-beam on the inside; and that these facts were known to the city council—they are estopped from revoking the license until the public interests require it. *Ibid.* “If from any cause,” says the court, “such as change in the travel or business, the construction of a scale by the town, or the condition or management of this scale, public interests require its removal, then the council may revoke the permission.” But scales placed in a street without authority may be removed by the municipal authorities. *Emerson v. Babcock*, 66 Iowa, 258; 23 N. W. Rep. 256.

3. Granting right to lay private switch track in street.—Neither the power to regulate the use of streets or to authorize the construction and operation of railroads therein, is sufficient to empower a city to grant the use of a street for a railroad or switch track for purely private purposes, and an abutting owner whose property will be damaged thereby may enjoin the construction and operation of such a road. *Glaessner v. Anheuser-Busch Brewing Assn.*, 2 Am. R. R. & Corp. Rep. 420; *Gustafson v. Hamm*, (Minn.) 57 N. W. Rep. 1054. In the last case the court says in its syllabus: “As the owner of a lot abutting on a street has, as appurtenant to the lot, and independently of the ownership of the fee of street, an easement in the street, to its full width, in front of his lot, for purposes of access, light and air, which constitutes property, therefore the maintenance and operation of a railroad on any part of the street in front of his lot so as to pollute the air, and thus depreciate the rental value of the premises, constitutes a positive invasion of property rights, for which the owner may maintain a private action; and where his legal right is clear, and the nuisance or trespass a continuing one, he may maintain an action to enjoin it.”

4. Other uses of street for private purposes.—See *Bateman v. City of Covington*, 3 Am. R. R. & Corp. Rep. 508; *Laing v. City of Americus*, 4 Am. R. R. & Corp. Rep. 228.

5. Uses of streets beneath the surface in connection with abutting property—license to construct vault under public alley, when irrevocable.—The charter of Chicago gave its board of public works power “to regulate the placing or building of vaults under the streets, alleys and sidewalks, and to require such compensation for the privilege as they shall deem

reasonable and just, subject to the approval of the common council." Under this authority the board granted the plaintiff a permit to construct a vault, under the alley in the rear of his lot, for use in connection with his lot, subject to the terms of a bond of even date. This bond required the plaintiff, his heirs and assigns, to keep the alley over the vault safe and in good repair for public use. Plaintiff constructed the vault and used it for nearly twenty years, complying with his bond as to repairs, etc., when the city undertook to revoke the permit and grant the use of half the alley, for similar purposes, to the property owner on the opposite side of the street. On a bill to enjoin the city from interfering with the plaintiff's rights and possession in the alley, it was held:

(1) That the permit and bond together constituted a contract between the plaintiff and the city.

(2) That the approval of the council might be inferred from its long acquiescence and that the covenants of the plaintiff were a good and sufficient consideration for the privileges granted by the city.

(3) That in making the contract the city acted in its private corporate capacity, as distinguished from its public and political or governmental capacity.

(4) That the permit could not be revoked or the rights of the plaintiff interfered with under it, except as the public interest or convenience demanded.

(5) That the attempt of the city to interfere with the plaintiff's rights and possession for the benefit of mere private parties was unwarranted and should be prevented by injunction. *Gregsten v. City of Chicago*, 145 Ill. 451; 84 N. E. Rep. 426. See, further, 9 Am. R. R. & Corp. Rep. 688, note.

CITY OF NEW ORLEANS V. ABBAGNATO.

(United States Circuit Court of Appeals, Fifth Circuit, May 29, 1894.)

1. **MUNICIPAL CORPORATIONS. LIABILITY FOR DAMAGES FOR DEATH BY ACT OF MOB.** In the absence of a statute giving a remedy, a city is not liable for damages for the taking of human life by a mob, although its officers may have been negligent in preserving the public peace.

2. The Civil Code of Louisiana, article 2315, declaring that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," which, by subsequent amendments, is made applicable to cases of death through negligence, and is extended to damages sustained therefrom by surviving relatives of the deceased, when construed with regard to the principles of the system of laws of which it is part, gives no remedy for such damages against a municipal corporation for negligence in preserving the public peace, resulting in loss of life by acts of a mob.

THIS was an action by the widow of Antonio Abbagnato against the city of New Orleans for damages for the death of

said Abbagnato. At the trial, the jury found for plaintiff, and judgment for plaintiff was entered on the verdict. Defendant brought error.

This action was commenced in the Circuit Court by petition as follows :

“The petition of Widow Giovanni Abbagnato, an alien, and subject of the king of Italy, domiciliated at Palermo, Sicily, kingdom of Italy, herein appearing and prosecuting in her own behalf and in her own right, respectfully represents that the city of New Orleans, a municipal corporation, chartered and organized under the laws of the state of Louisiana, and a citizen thereof, and domiciliated within the jurisdiction of this honorable court, is justly and truly indebted unto your petitioner in ——— capacity, hereinabove recited, in the full sum of thirty thousand dollars (\$30,000) damages, for the following right and cause of action, which arose on March 14, 1891, in the city of New Orleans, state of Louisiana, and within the jurisdiction of this honorable court, viz.: That Antonio Abbagnato (Bagnetto), an alien, and a subject by birth of the king of Italy, domiciliated at Palermo, Sicily, kingdom of Italy, emigrated therefrom to the United States on or about the year 1884, and that he came to Louisiana, and established his residence in the city of New Orleans. That, while here residing, he was arrested on or about October, 1890, together with twenty or more other persons, on a charge of murder of the chief of police of said city, D. C. Hennessy, which had recently occurred ; was prosecuted with said other persons for said crime before the Criminal District Court for the parish of Orleans, when, after a protracted trial, lasting ——— days, and after evidence adduced, argument of counsel and charge of the presiding judge, the jury, on March 13, 1891, returned into court and pronounced a verdict of acquittal as to said Antonio Abbagnato (Bagnetto), and five other co-accused including such who had been acquitted and such as to whom there had been a mistrial, were, pending further legal proceedings, reincarcerated in the parish prison, which is the property of the city of New Orleans. That during the evening and night of March 13, 1891, and immediately after the verdict of the jury had become known throughout said city of New Orleans, a conspiracy was formed by a certain body of men, whose names are now to your petitioner

unknown, with the avowed purpose of setting at naught the findings of said jury and the legal and regular methods of criminal trial and justice, as established and recognized in civilized communities throughout the world, and which had heretofore prevailed in the present community, and with the sole purpose of taking the law into their own hands, and of summarily, and without the formalities of trial and criminal justice, destroying by wholesale slaughter, the lives of the said Antonio Abbagnato (Bagnetto) and the other twenty or more co-accused, then incarcerated with him in said parish prison. That, in pursuance of said conspiracy and plan of action, a mass meeting was called for the next day at 10 A. M., at Clay statue, on the main street of the town, at about three-quarters of a mile from the parish prison, which said assembly was extensively advertised in the morning papers of the city, as appears by a copy of the New Orleans Times-Democrat of said date, which is annexed hereto for reference. That, in accordance with said call, a crowd congregated at said place, where several inflammatory speeches were made, as appears from the issue of the New Orleans Daily States, a newspaper of said city, dated March 14, 1891, which is hereto annexed for reference. That, after their passions had been so aroused, the mob moved in a body from the place of meeting to the parish prison, which they surrounded on all of its four sides, cutting off all avenues of escape therefrom. That some forty or fifty men out of said mob, whose names are now to your petitioner unknown, armed with Winchester rifles, shotguns, revolvers, axes, crowbars and other weapons, and who preceded the main body of the rioters, secured admission inside the walls of the prison by breaking open a rear door of the building, meeting with little or no resistance from the police authorities and other persons who should have been charged with the duty of protecting the avenues to said parish jail. That the said armed body of men took absolute possession of the building, and during 15 or 20 minutes, with said Winchester rifles, shotguns, pistols, axes and other deadly weapons, began an immediate search, hunt and slaughter of their intended victims, who were unarmed, and were mercilessly shot down and killed, including the said Antonio Abbagnato (Bagnetto) and ten other prisoners, two of whom, viz., the

said Antonio Abbagnato (Bagnetto) and Emanuele Polizzi (Manuel Polizzi), were taken out of the jail into the street, and were hanged by the neck to trees or lamp posts fronting said prison, and then riddled with bullets until death, the names of all the victims and the particulars of their horrible deaths being fully detailed in the issue of the New Orleans Picayune of March 15, 1891, which is hereunto annexed for reference. Now, your petitioner avers that, throughout all of the stages of this bloody drama, no proper steps, means or action were taken by the authorities having charge of the police, peace and good order of the city to suppress and defeat said conspiracy, although the mayor of the city of New Orleans, the chief of police, and their employees, agents, deputies and subordinates knew (as your petitioner is informed and verily believes), since the evening of March 13, 1891, or since early morning on March 14, 1891, that such a conspiracy existed, what its sanguinary programme was and the time, place and mode of executing the same. Your petitioner further avers that if the mayor of the city of New Orleans, Joseph A. Shakespeare, and if the acting chief of police, John Journee, on hearing the rumors circulating throughout the city, or on reading in the morning papers of the proposed mass meeting and understanding its dreadful purpose, had taken the proper steps of police and protection of said parish prison, as well as of the persons and lives of the prisoners which the law of the state had confided to the honor and justice of the city, the said riotous assemblage would never have organized, or would not have proceeded down the streets, or taken possession of the prison building, and the wholesale slaughter would have been prevented. That said parish prison is a massive brick building, with iron doors and railings, easy to defend by a handful of disciplined policemen, for a time at least, and until the militia of the state or other police assistance from the outside could have been summoned. That from Clay statue to the parish prison, a distance of almost a mile, no police officers or other guardians of the peace were stationed, with instructions to arrest the march of the mob coming down the street towards the prison. That the police force at the prison proper, in front of the building itself and in the interior thereof, was insufficient in number, was not armed, or imperfectly armed, was demoralized, was improperly led and

commanded, and readily yielded to the fury of the mob. That the safety of the prisoners might have been provided for by the prompt removal to another prison, police jail or other place of refuge. That the mayor of the city was not that morning at his office at the city hall, and could not be found, and that he gave no instructions to the police authorities to disperse the mob and to prevent the consummation of its bloodthirsty designs. That the mayor of New Orleans is the chief magistrate and executive officer of the city; is at the head of the police force, by virtue of his office, and is charged with the duty of seeing the laws executed, and of preserving the peace and good order within its limits. That the chief of police, next in command to the mayor, was equally derelict in his duties, and was, together with the said mayor and all of the employees, agents, deputies and subordinates, guilty of gross carelessness and culpable negligence. That, by reason of said gross carelessness and culpable negligence on the part of the said mayor of the city of New Orleans and the chief of police and the other subordinate officers of the police force, by reason of their inaction, supineness and failure to perform the duties of their respective offices in regard to the proper police of the city, as hereinabove fully recited, and by reason of other acts of omission and guilty indifference, to be shown at the trial of the case, the said city of New Orleans has become liable in damages to your petitioner in her hereinafter-mentioned capacity, by reason of a right and cause of action which had accrued to the said Antonio Abbagnato (Bagnetto), and which has survived his death, and become vested in your petitioner, as aforesaid. Your petitioner further represents that the said damages consist of the following items, viz. :

- “(1) The well-grounded terror and anxiety of mind under which the victim labored prior to the onslaught, which are fully worth the sum of five thousand dollars.

\$5,000
- “(2) The great mental and bodily pain, suffering and agony which preceded or accompanied his death, which are fully worth the sum of five thousand dollars.....

5,000
- “(3) The earnings and savings which the said decedent, who was a healthy, strong and able-bodied young man, might have realized during his natural life, had not

the same been prematurely cut off, which are fully worth the sum of ten thousand dollars.....	\$10,000
“(4) Exemplary and punitive damages for the failure of the city of New Orleans to secure and guaranty to said deceased the protection of life and person to which he was entitled under the Federal and State Constitutions and general laws of the country, as well as under the special provisions of the treaty entered into between the kingdom of Italy and the United States of America on February 26, 18—, and ratified at Washington on November 17, 1871, which are fully worth the sum of ten thousand dollars.....	10,000
“Total.....	<u>\$30,000</u>

“Your -petitioner further represents that the said Antonio Abbagnato (Bagnetto) was her son, and that he was unmarried and had no children at the time of his death, and that, in default of such wife and children, your petitioner, as surviving mother, has acquired the right of action for the aforesaid damages which has survived the death of the said Antonio Abbagnato (Bagnetto). Wherefore your petitioner prays that the city of New Orleans, through Joseph A. Shakespeare, its mayor, be cited to appear and answer this petition, and that, after due proceedings had, there be judgment in favor of your petitioner in her aforesaid capacity, and against the said city of New Orleans, for the sum of thirty thousand (\$30,000) dollars, with legal interest from the date of the verdict of the jury and of the judgment of court, and for all costs of suit, and for all general and equitable relief needful herein.”

Citation having issued, the city of New Orleans first appeared, and objected to the form of the citation, and, on that objection being overruled, filed a peremptory exception, as follows : “ Now, into this honorable court comes the city of New Orleans, the defendant herein, who files this peremptory exception to the demand of the plaintiff herein, to wit : That municipal corporations of this state are not liable for any other damages done by mobs or riotous assemblages, except to damages done to property. Defendant prays that this exception be maintained and the said

plaintiff's petition dismissed." The exceptions being overruled, the city filed an answer, excepting to the jurisdiction of the court, alleging that the said Antonio Abbagnato was an American citizen of the state of Louisiana, legally naturalized, which exception was also overruled. Thereupon such proceedings were had that a jury was impaneled, the cause tried, and a verdict against the city of New Orleans for the sum of \$5,000. Judgment was entered on the verdict, and the city of New Orleans brought the case to this court for review, assigning as error the one ground "that the court erred in overruling the exception herein filed, wherein defendant excepted to the plaintiff's petition on the ground that municipal corporations of this state are not liable for any other damages done by mobs or riotous assemblages except for damages done to property."

PARDEE, Circuit Judge (*after stating the facts*). The treaty between the kingdom of Italy and the United States proclaimed November 23, 1871, guarantees to the citizens of either nation in the territory of the other "the most constant protection and security for their persons and property," and further provides that "they shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives." Treaty of 1871, art. 3 (17 Stat. 845). This treaty applies to this case only so far as to require that the rights of the plaintiff shall be adjudicated and determined exactly the same as if she were, and her deceased son had been, a native citizen of the United States.

The Constitution of the state of Louisiana provides as follows: "The citizens of the city of New Orleans or any political corporation which may be created within its limits shall have the right of appointing the several public officers necessary for the administration of the police of said city, and pursuant to the mode of election which shall be provided by the general assembly." Const. La. 1879, art. 253. "The maintenance and support of persons confined in the parish of Orleans upon charges or conviction for criminal offenses shall be under the control of the city of New Orleans." Id. art. 147.

The charter of the city of New Orleans — "Creates all the inhabitants of the parish of Orleans, as now bounded by * * *

as a body corporate, and establishes them as a political corporation by the name of the 'City of New Orleans,' with the following powers, and no more: It shall have a seal and may sue and be sued. * * * [Section 1.] The council shall have power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper to preserve the peace and good order of the city; * * * to organize and provide an efficient police. * * * [Section 7.] The council shall also have power * * * to establish jails, houses of refuge and reformation and correction, and make regulations for their government, and to exercise a general police power in the city of New Orleans. [Section 8.] The mayor shall keep his office at the city hall; * * * shall see that the laws and ordinances within the limits of the city of New Orleans be properly executed; * * * shall be ex-officio justice and conservator of the peace. * * * [Section 19.]" Acts 1882, No. 20, p. 14.

The act of the legislature of Louisiana (passed in 1888) creating the police board of the city of New Orleans, preserves to the mayor of the city of New Orleans the power, as the commander-in-chief of the police force, to issue such orders as may be necessary and proper for the preservation of the peace in the city of New Orleans, and in said act it was declared that: 'It is hereby made the duty of the police force at all times of the day and night, and the members of such force are thereunto empowered, to especially preserve the public peace, to prevent crimes, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages which obstruct the free passage of public streets, sidewalks, squares and places, protect the rights of persons and property," etc. Acts 1888, No. 63, p. 64.

The city of New Orleans, by her pleadings, admits the gross negligence charged in the petition in the performance of the duties devolving upon the municipality under the Constitution and laws of the state above referred to, whereby Abbagnato lost his life at the hands of a mob while in the custody of the law; and the question presented in this case is whether, on such admission of facts, the city can be held liable in damages. It is well settled that at common law no civil action lies for injury to a person which results in his death. *Insurance Co. v. Brame*, 95 U. S. 754-756;

Dennick v. Railroad Co., 103 U. S. 11. 21; *The Harrisburg*, 119 U. S. 199-214; 7 Sup. Ct. Rep. 140. The rule is the same under the civil law, according to the decisions of the Louisiana Supreme Court. *Hubgh v. Railroad Co.*, 6 La. Ann. 495; *Hermann v. Railroad Co.*, 11 La. Ann. 5. In the absence of a statute giving a remedy, public or municipal corporations are under no liability to pay for the property of individuals destroyed by mobs or riotous assemblages. Add. Torts, 1305; *Dillon Mun. Corp.* § 959.

In the case of *State v. Mayor, etc., of New Orleans*, 109 U. S. 285; 3 Sup. Ct. Rep. 211, the Supreme Court of the United States held that the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded on contract. It is a statutory right, and may be given or taken away at pleasure. In the same case, Mr. Justice BRADLEY, concurring, said: "I concur in the judgment of this case, on the special ground that remedies against municipal bodies for damages caused by mobs or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall or shall not indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall or shall not do so is a matter of legislative discretion, just as it is whether the public shall or shall not indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion."

If this be the rule with regard to the liability of municipal corporations for damages to property committed by mobs or riotous assemblages, a fortiori it must be the rule with regard to the liability of municipal corporations for damages resulting in the loss of life from the acts of mobs or riotous assemblages. The reason of the rule is obvious. Actions to recover from municipal corporations damages resulting from the acts of mobs and riotous assemblages are actions to hold such corporations liable in damages for a failure to preserve the public peace. The preservation of the public peace primarily devolves upon the sovereign. Under our system of government, the state is that sovereign.

U. S. v. Cruikshank, 92 U. S. 542-553 ; Western College v. City of Cleveland, 12 Ohio St. 377. When, by the action of the state, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation pro tanto is charged with governmental functions in the public interest and for public purposes, and is entitled to the same immunity as the sovereign granting the power for negligence in preserving the public peace, unless such liability is expressly declared by the sovereign. This proposition is so well recognized that not a well-considered, adjudicated case can be found in the books where, in the absence of an express statute, any municipality has been held liable for the neglect of its officers to preserve the peace. In the case of Western College v. City of Cleveland, supra, it was said: "It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property when they are to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the property comprised within the limits of the corporation and its adaptation for the purposes of residence and business. As to the first, the municipal corporation represents the state; as to the second, the municipal corporation represents the pecuniary and proprietary interest of the individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

The exemption of municipalities from liability to suits for damages for the negligence of officers and agents in the execution of the governmental functions granted by the state, in the public

interest, and in the absence of statutory liability, is recognized in Louisiana, as shown by the decisions of the Supreme Court of the state in *Egerton v. Third Municipality*, 1 La. Ann. 437; *Stewart v. City of New Orleans*, 9 La. Ann. 461; *Lewis v. New Orleans*, 12 La. Ann. 190; *Bennett v. New Orleans*, 14 La. Ann. 120; *Howe v. New Orleans*, 12 La. Ann. 482; *New Orleans, etc., R. Co. v. New Orleans*, 26 La. Ann. 478 — although *Johnson v. Municipality No. 1*, 5 La. Ann. 100; *Clague v. New Orleans*, 13 La. Ann. 275, and *Chase v. Mayor*, 9 La. 343, are apparently to the contrary. The Louisiana cases, as well as those of other states, are very ably reviewed, and the whole matter discussed, in a well-considered opinion of the learned judge of the eastern district of Louisiana in the case of *Monasterio v. City of New Orleans* (recently decided), 62 Fed. Rep. —. It follows, therefore, that in order to recover damages against the city of New Orleans for the taking of human life by a mob in said city, no matter what the negligence of the city officials may have been, there must be a statute of the state of Louisiana expressly or by necessary implication giving a remedy in such cases.

Section 2453 of the Revised Statutes of Louisiana reads as follows: "The different municipal corporations in this state shall be liable for the damages done to property by mobs or riotous assemblages in their respective limits."

And article 2315, Revised Civil Code, as last amended, reads as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father or mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife as the case may be." Article 2316, Revised Civil Code, reads as follows: "Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill." And article 2317: "We are responsible not only for the damage caused by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

It is not seriously contended in this case that article 2453 of the Revised Statutes of the state warrants the maintenance of the present suit, or fixes any liability upon the city of New Orleans because of the death of Abbagnato at the hands of a mob, as recited in the petition. As we consider the statute and the fact of its existence on the statute book, it goes rather to deny the right to recover in this case than to support it, for it shows clearly that in the legislative mind the statute was necessary to fix liability upon municipal corporations for damages to property done by mobs; and the limitation of the right to recover damages to property only shows a clear legislative intent that beyond property, and for life or limb, municipal corporations should not be responsible. The entire right of the plaintiff in error to recover damages must then be based upon article 2315 and the subsequent articles of the Civil Code, above quoted. Article 2315, as originally adopted, was as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." It was under this article that the decision in *Hubgh v. Railroad Co.*, supra, was rendered, holding that an action for damages caused by the homicide of a free human being cannot be maintained. In regard to the article the court says: "The provisions of this article, however general and comprehensive its terms may be, are found more than once recited in terms equally general and comprehensive in the laws of the 15th title of the 7th Partida. The article was inserted in the Code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a Code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a Code or not. * * * Merlin, in giving his conclusions before the Court of Cassation, in the case of *Michel, Reynier et al.*, respecting the article 1382 of the Code Napoleon, which is identical with the article 2294 of our Code, says: 'The principle laid down in article 1382 is not new. It is drawn from the natural law: and, long before the Napoleon Code, the Roman laws had solemnly proclaimed it. Long before that Code, the French laws had recognized and assumed its existence.'"

We understand from this that the article of the Civil Code in question was not an innovation of the civil law, in force in the state, introducing new principles and establishing new duties and responsibilities, which did not before exist. It is a part of a system of laws, and controlling only where, under general principles, it is applicable to the facts and liabilities of a particular case. We have shown that the article was not enforceable when the "act whatever of man" resulted in death, until the statute so declared, and this because of the intervention of other equally well-recognized principles of law. To make it applicable in case of death through negligence, the legislature of 1855 amended the article by adding thereto as follows: "The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death." Acts 1855, No. 223, p. 270. As thus amended, the scope of the article was still too narrow to permit the recovery of other damages than such as the deceased himself would have had had he survived the injury (*Vredenburg v. Behan*, 33 La. Ann. 627); and, therefore, the article was again amended and re-enacted, adding thereto as follows: "The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife as the case may be." Acts 1884, p. 94. Neither the amendment of 1855 nor that of 1884 enlarges the scope of the article as to the persons who may be held liable for negligence. The amendments go no further than to provide for a limited survival of the action and an enlarged rule of damages. The article is applicable now to the same persons, and to no others, as before amendment; and if, before amendment, it could not be applied so as to hold a municipal corporation liable for damages resulting from the acts of mobs and riotous assemblages, it cannot be so applied now. Before this amendment, it declared well-known principles of the civil law, but not all of them, and it controlled in cases where the application of other well-known rules and principles did not deny the action or defeat recovery. As amended, it should have the same construction and be given the same force. Before the act of 1855, it was not contended, nor could it have been successfully contended, that the article was

applicable as against a municipal corporation to recover damages to either person, life or property resulting from the acts of mobs and riotous assemblages. For these reasons, we are clear that neither expressly nor by implication does it now give a remedy in damages against a municipal corporation for negligence in preserving the public peace resulting in the loss of life by the acts of a mob. As we find no law of the state of Louisiana giving a remedy in damages against a municipal corporation for the acts done by a mob resulting in the loss of human life, we are compelled to reverse the judgment of the court below.

In the exceedingly able and interesting brief, showing great industry and research, presented to this court by the learned counsel for the defendant in error, it is said: "The question here presented is not a street fight or murder, without any premonition on the part of the city authorities, and without culpable neglect in the discharge of their duties; nor is it the case of a police force, in its attempt to quell an insurrection, being overpowered by a mob. But, on the contrary, we have the extraordinary spectacle of a mob organizing in a city of a quarter million inhabitants, to the knowledge of the authorities, and without any efforts to disperse them, marching down the streets for the distance of a mile, armed and in broad daylight; taking possession of a city building and killing its inmates, for an hour or more, and until their thirst for blood was satiated — a deed unparalleled and unheard of in the history of the world."

Before entering judgment we feel called to say that we exceedingly regret that the conclusions of the learned counsel on the law of the case as otherwise discussed in their brief are not as well founded as is their just indignation in considering the facts; and we think it proper, in view of the well-known facts attending the Italian lynching in the city of New Orleans in 1891, to reproduce part of what was so well said by the Supreme Court of the United States in *Ex parte Wall*, 107 U. S. 265-274; 2 Sup. Ct. Rep. 569, in regard to lynching: "It is not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant;

and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered."

The judgment of the Circuit Court is reversed and the case is remanded, with instructions to maintain the exception of non-liability and dismiss the plaintiff's petition.*

1. Municipalities not liable at common law for property damaged or destroyed by mobs.—All the authorities are agreed upon this proposition. *Prather v. City of Lexington*, 13 B. Mon. 559 (1852); *Ward v. City of Louisville*, 16 B. Mon. 184 (1855); *Western College v. City of Cleveland*, 12 Ohio St. 375 (1861); *Mayor, etc., of Baltimore v. Poultney*, 25 Md. 107; *Duffy v. Mayor, etc., of Baltimore*, Taney, 200; *Hart v. City of Bridgeport*, 13 Blatch. 289; *Louisiana ex rel. v. New Orleans*, 109 U. S. 285; 2 Dill Munic. Corp. §§ 959, 960.

2. Statutes imposing a liability upon municipalities in case of the destruction of life or property by mobs.—Such acts are construed and applied in the following cases: *Dale County v. Gunther*, 46 Ala. 118 (1871); *Clear Lake Water Works Co. v. Lake County*, 45 Cal. 90 (1872); *City of Atchison v. Twine*, 9 Kans. 850 (1872); *Fauvia v. City of New Orleans*, 20 La. Ann. 410 (1868); *Williams v. City of New Orleans*, 23 La. Ann. 507 (1871); *Brightman v. Inhabitants of Bristol*, 65 Maine, 426 (1876); *Mayor, etc., of Baltimore v. Poultney*, 25 Md. 107 (1866); *Mayor, etc., of Hagerstown v. Detroit*, 32 Md. 369 (1869); *Underhill v. Manchester*, 45 N. H. 214; *Chadbourne v. Town of Newcastle*, 48 N. H. 196 (1868); *Newberry v. New York*, 1 Sweeney, 369; *Davidson v. Mayor, etc.*, 2 Robt. 330; *Blodgett v. City of Syracuse*, 36 Barb. 526; *Moody v. Board of Supervisors of Niagara County*, 46 Barb. 659 (1866); *Darlington v. Mayor, etc., of New York*, 31 N. Y. 164 (1865); *Ely v. Board of Supervisors*, 36 N. Y. 297 (1867); *Hill v. Board of Supervisors*, 119 N. Y. 844; 23 N. E. Rep. 921; *Hermits of St. Augustine v. Phila. County*, Brightly, 116; *St. Michael's Church v. Phila. County*, Brightly, 121; *Donoghue v. County*, 3 Penn. St. 230 (1845); *Matter of the Pennsylvania Hall*, 5 Penn. St. 204 (1847); *County of Allegheny v. Gibson*, 90 Penn. St. 397 (1879); *Louisiana ex rel. v. New Orleans*, 109 U. S. 285; *Duffy v. Mayor, etc., of Baltimore*, Taney, 200 (1852); *Hart v. City of Bridgeport*, 13 Blatch. 289 (1876); *Gianfortune v. City of New Orleans*, 61 Fed. Rep. 64 (1894).

* Reported in 62 Fed. Rep. 240.

It is within the constitutional power of the legislature to impose such liability upon municipal corporations. *Darlington v. Mayor, etc., of New York*, 31 N. Y. 164; *Matter of Pennsylvania Hall*, 5 Penn. St. 204; *County of Allegheny v. Gibson*, 90 Penn. St. 397; *Louisiana v. New Orleans*, 109 U. S. 285. There being no liability at common law, it follows that the plaintiff can only obtain relief to the extent, upon the conditions and in the manner pointed out by the statute, and to recover he must bring himself clearly within the statute. *Dale County v. Gunther*, 46 Ala. 118; *Clear Lake Water Works Co. v. Lake County*, 45 Cal. 90; *City of Atchison v. Twine*, 9 Kans. 350; *Fauvia v. City of New Orleans*, 20 La. Ann. 410; *Williams v. City of New Orleans*, 23 La. Ann. 507; *Mayor, etc., of Baltimore v. Poultney*, 25 Md. 107; *Duffy v. Mayor, etc., of Baltimore*, Taney, 200. The plaintiff has no constitutional right to a jury trial upon the amount of damage, but the legislature may provide for an appraisalment by six persons appointed by a court. *Matter of Pennsylvania Hall*, 5 Penn. St. 204. The remedy may be given or taken away at the pleasure of the legislature, and even when the claim has been reduced to judgment the plaintiff has no vested right to the damages awarded. *Louisiana ex rel. v. New Orleans*, 109 U. S. 285.

As usually worded such statutes apply as well to the property of nonresidents as to the property of residents, and to property in transitu, as well as to property having its situs within the municipality. *County of Allegheny v. Gibson*, 90 Penn. St. 397. It is no defense that the rioters were all or mostly nonresidents. *Chadbourn v. Town of Newcastle*, 48 N. H. 196. Nor that the mob was beyond the control of the local authorities, and that the state assumed the task of restoring order. *County of Allegheny v. Gibson*, 90 Penn. St. 397.

Some of the statutes require that the owner shall have given notice to the proper authorities of the threat or attempt to destroy his property, or of the danger of its destruction. It is held that the owner need not give notice if he has no knowledge on the subject, or no opportunity to communicate with the authorities, or if they are fully aware of the facts. *Ely v. Board of Supervisors*, 36 N. Y. 297; S. C., sub. nom. *Moody v. Board of Supervisors*, 46 Barb. 659; *Donoghue v. County*, 2 Penn. St. 230; *County of Allegheny v. Gibson*, 90 Penn. St. 397.

It is no defense to an action under such a statute that the property destroyed was a public nuisance, such as a fish-oil factory, *Brightman v. Inhabitants of Bristol*, 65 Maine, 426; or a bawdy house and a resort for thieves, robbers and murderers. *Blodgett v. City of Syracuse*, 36 Barb. 526; *Ely v. Board of Supervisors*, 36 N. Y. 297; S. C., sub. nom. *Moody v. Board of Supervisors*, 46 Barb. 659.

The New Hampshire act provides that no person or persons shall be entitled to the benefit of the act, "if it shall appear that the destruction of his or their property was caused by his or their illegal or improper conduct." It is held that the destruction is "caused" by such conduct, if, without such conduct, it would not have happened; also, that "illegal" conduct refers to conduct unlawful or contrary to law, while "improper" conduct means what is not suitable to the circumstances, time and place, and is "such conduct as a man of ordinary and reasonable care and prudence would not, under the circum-

stances, have been guilty of." *Chadbourn v. Town of Newcastle*, 48 N. H. 196; *Underhill v. Manchester*, 45 N. H. 214. The same provisions occurs in the later Pennsylvania statute, and are considered in *County of Allegheny v. Gibson*, 90 Penn. St. 897.

The New York statute provides that no person shall be entitled to recover under the act, "if such destruction or injury was occasioned, or in any manner aided, sanctioned or permitted by the carelessness or negligence of such person." It has been held that the using of the property as a house of ill-fame, or permitting it to be a resort for thieves, robbers and murderers, was not an act of carelessness or negligence within the act. *Blodgett v. City of Syracuse*, 36 Barb. 526; *Ely v. Board of Commissioners*, 36 N. Y. 297; S. C., 46 Barb. 659.

A building destroyed by fire communicated from a building set on fire by a mob, is destroyed by the mob within the meaning of such statutes. *Donoghue v. County*, 2 Penn. St. 280.

UNITED STATES v. E. C. KNIGHT & Co.

(Supreme Court of the United States, January 21, 1895.)

1. **MONOPOLIES AND COMBINES. WHAT CONSTITUTES MONOPOLY AND RESTRAINT OF COMMERCE WITHIN THE FEDERAL ANTI-TRUST ACT. THE SUGAR TRUST.** The purchase of the stock of sugar refining companies for the purpose of acquiring control of the business of refining and selling sugar in the United States, and which results in establishing such control, does not involve monopoly or restraint of interstate or foreign commerce within the meaning of the Federal Anti-Trust Act, since the business of refining and selling sugar is not commerce.

2. **DEMARCATON BETWEEN THE COMMERCIAL POWER OF CONGRESS AND THE POLICE POWER OF THE STATES.** That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.

8. Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated by congress, because they form part of interstate trade or commerce, and over these the power of congress is exclusive.

4. The power of the state to protect the lives, health and property of its citizens, and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion, including the power to relieve the citizens of the state from the burden of monopoly and the evils resulting from the restraint of trade among its citizens, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

5. **MANUFACTURE AND PRODUCTION ARE NOT COMMERCE.** Manufacture and production are not commerce and are consequently not subject to the control of congress within the states, and the fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.

6. **MONOPOLY OF PRODUCTION NOT A RESTRAINT OF COMMERCE.** Contracts, combinations or conspiracies to control and monopolize domestic enterprise in manufacture and production, and which tend to that result, although they may indirectly affect and restrain interstate and foreign commerce, and although the product may be intended for sale and distribution among the several states, do not fall within the act of congress July 2, 1890, and cannot be directly suppressed thereunder.

THIS was a bill filed by the United States against E. C. Knight Company and others, in the Circuit Court of the United States for the eastern district of Pennsylvania, charging that the defendants had violated the provisions of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, chap. 647), "providing that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several states is illegal, and that persons who shall monopolize, or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several states, shall be guilty of a misdemeanor." The bill alleged that the defendant the American Sugar Refining Company was incorporated under and by virtue of the laws of New Jersey, whose certificate of incorporation named the places in New Jersey and New York at which its principal business was to be transacted, and several other states in which it proposed to carry on operations, and stated the objects for which said company was formed were "the purchase, manufacture, refining and sale of sugar, molasses and melads, and all lawful business incidental thereto;" that the defendant E. C. Knight Company was incorporated under the laws of Pennsylvania "for the purpose of importing, manufacturing, refining and dealing in sugars and molasses" at the city of Philadelphia; that the defendant the Franklin Sugar Company was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and the purchase of raw mate-

rial for that purpose" at Philadelphia; that the defendant Spreckels Sugar Refining Company was incorporated under the laws of Pennsylvania "for the purpose of refining sugar, which will involve the buying of the raw material therefor, and selling the manufactured product, and of doing whatever else shall be incidental to the said business of refining," at the city of Philadelphia; that the defendant the Delaware Sugar House was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and syrups, and preparing the same for market, and the transaction of such work or business as may be necessary or proper for the proper management of the business of manufacture."

It was further averred that the four defendants last named were independently engaged in the manufacture and sale of sugar until or about March 4, 1892; that the product of their refineries amounted to thirty-three per cent of the sugar refined in the United States; that they were competitors with the American Sugar Refining Company; that the products of their several refineries were distributed among the several states of the United States, and that all the companies were engaged in trade or commerce with the several states and with foreign nations; that the American Sugar Refining Company had, on or prior to March 4, 1892, obtained the control of all the sugar refineries of the United States, with the exception of the Revere of Boston and the refineries of the four defendants above mentioned; that the Revere produced annually about two per cent of the total amount of sugar refined.

The bill then alleged that, in order that the American Sugar Refining Company might obtain complete control of the price of sugar in the United States, that company, and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, machinery and real estate of the other four corporations defendant, by which they attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other states as theretofore carried on independently by said defendants; that in pursuance of this scheme, on or about March 4, 1892, Searles entered into a contract with the defendant Knight Company and individual stockholders named for the purchase of all the stock of that company, and subse-

quently delivered to the defendants therefor in exchange shares of the American Sugar Refining Company; that on or about the same date Searles entered into a similar contract with the Spreckels Company and individual stockholders, and with the Franklin Company and stockholders, and with the Delaware Sugar House and stockholders. It was further averred that the American Sugar Refining Company monopolized the manufacture and sale of refined sugar in the United States and controlled the price of sugar; that in making the contracts, Searles and the American Sugar Refining Company combined and conspired with the other defendants to restrain trade and commerce in refined sugar among the several states and foreign nations, and that the said contracts were made with the intent to enable the American Sugar Refining Company to restrain the sale of refined sugar in Pennsylvania and among the several states, and to increase the regular price at which refined sugar was sold, and thereby to exact and secure large sums of money from the state of Pennsylvania and from the other states of the United States, and from all other purchasers; and that the same was unlawful and contrary to the said act.

The bill called for answers under oath and prayed:

“(1) That all and each of the said unlawful agreements made and entered into by and between the said defendants on or about the 4th day of March, 1892, shall be delivered up, canceled and declared to be void; and that the said defendants the American Sugar Refining Company and John E. Searles, Jr., be ordered to deliver to the other said defendants respectively the shares of stock received by them in performance of the said contracts; and that the other said defendants be ordered to deliver to the said defendants the American Sugar Refining Company and John E. Searles, Jr., the shares of stock received by them respectively in performance of the said contracts.

“(2) That an injunction issue preliminary until the final determination of this cause, and perpetual thereafter, preventing and restraining the said defendants from the further performance of the terms and conditions of the said unlawful agreements.

“(3) That an injunction may issue preventing and restraining the said defendants from further and continued violations of the said act of congress approved July 2, 1890.

“(4) Such other and further relief as equity and justice may require in the premises.”

Answers were filed and evidence taken which was thus sufficiently summarized by Judge BUTLER in his opinion in the Circuit Court:

“The material facts proved are that the American Sugar Refining Company, one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Company, the Spreckels Sugar Refinery and the Delaware Sugar House were incorporated under the laws of Pennsylvania, and authorized to purchase, refine and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and, prior to March, 1892, produced about thirty-three per cent of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Company, and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Company had obtained control of all refineries in the United States, excepting the four located in Philadelphia and that of the Revere Company in Boston, the latter producing about two per cent of the amount refined in this country; that in March, 1892, the American Sugar Refining Company entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Company thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Company obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the

sellers free to establish other refineries, and free to continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House Refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Company; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

“The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country.”

The Circuit Court held that the facts did not show a contract, combination or conspiracy to restrain or monopolize trade or commerce “among the several states or with foreign nations,” and dismissed the bill. 60 Fed. Rep. 306. The cause was taken to the Circuit Court of Appeals for the third circuit, and the decree affirmed. 9 C. C. A. 297; 60 Fed. Rep. 934. This appeal was then prosecuted. The act of congress of July 2, 1890, is set forth in the margin.*

* “An act to protect trade and commerce against unlawful restraints and monopolies.

“Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any

Attorney-General Olney, Solicitor-General Maxwell and S. F. Phillips, for appellant. John G. Johnson and John E. Parsons, for appellees.

FULLER, Ch. J. (*after stating the facts*). By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations, contrary to the act of congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such

part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may

relief could be afforded under that prayer as would be agreeable to the case made by the bill and consistent with that specifically prayed. And, as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce which, by the provisions of the act, could be rescinded, or operations thereunder arrested.

In commenting upon the statute (21 Jac. I. chap. 3), at the commencement of chapter 85 of the third institute, entitled "Against Monopolists, Propounders and Projectors," Lord Coke, in language often quoted, said :

"It appeareth by the preamble of this act (as a judgment in parliament) that all grants of monopolies are against the ancient and fundamentall laws of this kingdome. And, therefore, it is necessary to define what a monopoly is.

be, to the hearing and determination of the case ; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not ; and subpoenas to that end may be served in any district by the marshal thereof.

"Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"Sec. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." 26 Stat. 209, chap. 647.

“A monopoly is an institution, or allowance by the king by his grant, commission or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.

“For the word ‘monoply,’ dicitur ἀπὸ τοῦ μόνου, (i. solo,) καὶ πωλεῖσθαι, (i. vendere,) quod est cum unus solus aliquod genus mercaturæ universum vendit, ut solus vendat, pretium ad suum libitum statuens: hereof you may read more at large in that case. Trin. 44 Eliz. lib. 11, f. 84, 85; le case de monopolies.” 3 Inst. 181.

Counsel contend that the definition, as explained by the derivation of the word, may be applied to all cases in which “one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure,” whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of congress is not confined to the common-law sense of the term as implying an exclusive control, by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life.

In the view which we take of the case, we need not discuss whether, because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore, there was no combination to monopolize; or because, according to political economists, aggregations of capital may reduce prices,

therefore the objection to concentration of power is relieved ; or, because others were theoretically left free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries, after becoming stockholders of the American Company, might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of congress in the mode attempted by this bill.

It cannot be denied that the power of a state to protect the lives, health and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen ; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community — is subject to regulation by state legislative power. On the other hand, the power of congress to regulate commerce among the several states is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free, except as congress might impose restraints. Therefore, it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states, and if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the congress and the state cannot occupy the position of

equal opposing sovereignties, because the Constitution declares its supremacy, and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce undoubtedly is traffic," said Chief Justice MARSHALL, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Brown v. Maryland*, 12 Wheat. 419, 448; *The License cases*, 5 How. 599; *Mobile Co. v. Kimball*, 102 U. S. 691; *Bowman v. Railway Co.*, 125 U. S. 465; 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep. 681; *In re Rahrer*, 140 U. S. 545, 555; 11 Sup. Ct. Rep. 865.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however

sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government, and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. This was so ruled in *Coe v. Errol*, 116 U. S. 517; 6 Sup. Ct. Rep. 475, in which the question before the court was whether certain logs cut at a place in New Hampshire, and hauled to a river town for the purpose of transportation to the state of Maine, were liable to be taxed like other property in the state of New Hampshire. Mr. Justice BRADLEY, delivering the opinion of the court, said: "Does the owner's state of mind in relation to the goods—that is, his intent to export them, and his partial preparation to do so—exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the state of their origin to that of their destination."

And again, in *Kidd v. Pearson*, 128 U. S. 1, 20, 24; 9 Sup.

Ct. Rep. 6, where the question was discussed whether the right of a state to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the state and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors, within the limits of the state for export, did not constitute an unauthorized interference with the right of congress to regulate commerce. And Mr. Justice LAMAR remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stockraising, domestic fisheries, mining; in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat-grower of the northwest, and the cotton planter of the south, plant, cultivate and harvest his crop with an eye on the prices of Liverpool, New York and Chicago? The power being vested in congress and denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are, and must be, local, in all the details of their successful management. * * * The demands of such supervision would require, not uniform legislation generally applicable throughout the United States, but a

swarm of statutes only locally applicable, and utterly inconsistent. Any movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, would only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement towards the local, detailed and incongruous legislation required by such interpretation would be about the wildest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the state, and the interminable trouble would be presented that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see *Veazie v. Moore*, 14 How. 568, 574.

In *Gibbons v. Ogden*, *Brown v. Maryland*, and other cases often cited, the statute laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in *Kidd v. Pearson* the refusal of a state to allow articles to be manufactured within her borders, even for export, was held not to directly affect external commerce; and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.

Contracts, combinations or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the

restraint would be an indirect result, however inevitable, and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy.

Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition. Slight reflection will show that, if the national power extends to all contracts and combinations in manufacture, agriculture, mining and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or commerce with the several states and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and

other states, and refined sugar was also forwarded by the companies to other states for sale. Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainant to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture by the restoration of the status quo before the transfers; yet the act of congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree.

Decree affirmed.

Mr. Justice HARLAN dissented.*

1. Dissenting opinion of Mr. Justice Harlan.—Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey for the purpose of buying, manufacturing, refining and selling sugar in different parts of the country, had obtained the control of all the sugar refineries in the United States, except five, of which four were owned and operated by Pennsylvania corporations—the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company and the Delaware Sugar House—and the other by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about thirty-three per cent, and that of the Boston company about two per cent, of the entire quantity of sugar refined in the United States.

In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation—using for that purpose its own stock—purchased the stock of those companies, and

* Reported in 15 Sup. Ct. Rep. 249.

thus obtained absolute control of the entire business of sugar refining in the United States, except that done by the Boston company, which is too small in amount to be regarded in this discussion.

"The object," the court below said, "in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country." This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not, therefore, analyze the evidence upon this point. In its consideration of the important constitutional question presented, this court assumes on the record before us that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade among the states in food products that are essential to the comfort of every household in the land.

The court holds it to be vital in our system of government to recognize and give effect to both the commercial power of the nation and the police powers of the states, to the end that the Union be strengthened, and the autonomy of the states preserved. In this view I entirely concur. Undoubtedly, the preservation of the just authority of the states is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority by whatever means such a result might be accomplished. "Without the states in union," this court has said, "there could be no such political body as the United States." *Lane Co. v. Oregon*, 7 Wall, 71, 76. But it is equally true that the preservation of the just authority of the general government is essential as well to the safety of the states as to the attainment of the important ends for which that government was ordained by the people of the United States; and the destruction of that authority would be fatal to the peace and well-being of the American people. The Constitution, which enumerates the powers committed to the nation for objects of interest to the people of all the states, should not, therefore, be subjected to an interpretation so rigid, technical and narrow that those objects cannot be accomplished. Learned counsel in *Gibbons v. Ogden*, 9 Wheat. 1, 187, having suggested that the Constitution should be strictly construed, this court, speaking by Chief Justice MARSHALL, said that when the original states "converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." "What do gentlemen mean," the court inquired, "by

a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, one might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent, then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded." *Id.* 188. On the same occasion the principle was announced that the objects for which a power was granted to congress, especially when those objects are expressed in the Constitution itself, should have great influence in determining the extent of any given power.

Congress is invested with power to regulate commerce with foreign nations and among the several states. The power to regulate is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised whenever necessary throughout the territorial limits of the several states. *Cohens v. Virginia*, 6 Wheat. 264, 413. The power to make these regulations "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." It is plenary because vested in congress "as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It may be exercised "whenever the subject exists." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 196. In his concurring opinion in that case Mr. Justice JOHNSON observed that the grant to congress of the power to regulate commerce carried with it the whole subject, leaving nothing for the state to act upon, and that, "if there was any one object riding over every other in the adoption of the Constitution, it was to keep commercial intercourse among the states free from all invidious and partial restraints." *Id.* 231. "In all commercial regulations we are one and the same people." Mr. Justice BRADLEY, speaking for this court, said that the United States are but one country, and are and must be subject to one system of regulations in respect to interstate commerce. *Robbins v. Taxing Dist.*, 120 U. S. 489, 494; 7 Sup. Ct. Rep. 592.

What is commerce among the states? The decisions of this court fully answer the question. "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse." It does not embrace the completely interior traffic of the respective states—that which is "carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states"—but it does embrace "every species of commercial intercourse" between the United States and foreign nations and among the states, and, therefore, it includes such traffic or trade, buying, selling and interchange of commodities, as directly affects or necessarily involves the interests of the people of the United States. "Commerce, as the word is used in the Constitution, is a unit." and "cannot stop at the external boundary

line of each state, but may be introduced into the interior." "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally."

These principles were announced in *Gibbons v. Ogden*, and have often been approved. It is the settled doctrine of this court that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected. In *Mobile Co. v. Kimball*, 102 U. S. 691, 702, it was said that commerce with foreign countries and among the states, strictly considered, consists "in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities." In *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203; 5 Sup. Ct. Rep. 826, the language of the court was: "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in congress, is the power to prescribe the rules by which it shall be governed — that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions." In *Kidd v. Pearson*, 128 U. S. 1, 20; 9 Sup. Ct. Rep. 6, it was said that "the buying and selling and the transportation incidental thereto constitute commerce." Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one state to another — every species of commercial intercourse among the states and with foreign nations.

In the light of these principles, determining as well the scope of the power to regulate commerce among the states as the nature of such commerce, we are to inquire whether the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, chap. 647), is repugnant to the Constitution.

By that act "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations," is declared to be illegal, and every person making any such contract, or engaging in any such combination or conspiracy, is to be deemed guilty of a misdemeanor, and punishable, on conviction, by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 1. It is also made a misdemeanor, punishable in like manner, for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations." § 2. The act also declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories or any state or states or the District of Columbia, or with foreign nations, or between the District of

Columbia and any state or states or foreign nations," and prescribes the same punishments for every person making any such contract, or engaging in any such combination or conspiracy. § 3.

The 4th section of the act is in these words: "Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 26 Stat. 209, chap. 647.

It would seem to be indisputable that no combination of corporations or individuals can, of right, impose unlawful restraints upon interstate trade, whether upon transportation or upon such interstate intercourse and traffic as precede transportation, any more than it can, of right, impose unreasonable restraints upon the completely internal traffic of a state. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a combination of corporations or individuals may, so far as the power of congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish one primary object of the Union, which was to place commerce among the states under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.

The fundamental inquiry in this case is, what, in a legal sense, is unlawful restraint of trade?

Sir WILLIAM ERLE, formerly chief justice of the Common Pleas, in his essay on the Law Relating to Trade Unions, well said that "restraint of trade, according to a general principle of the common law, is unlawful;" that "at common law every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction;" and that "the right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law." Pp. 5-7.

There is a partial restraint of trade which, in certain circumstances, is tolerated by the law. The rule upon that subject is stated in *Navigation Co. v. Winsor*, 20 Wall. 64, 66, where it was said that: "An agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on

good consideration, not to use a trade anywhere in England is held void in that country as being too general a restraint of trade." *Horner v. Graves*, 7 Bing. 743.

But a general restraint of trade has often resulted from combinations formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character have frequently been the subject of judicial scrutiny, and have always been condemned as illegal because of their necessary tendency to restrain trade. Such combinations are against common right, and are crimes against the public. To some of the cases of that character it will be well to refer.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, 183-187, the principal question was as to the validity of a contract made between five coal corporations of Pennsylvania, by which they divided between themselves two coal regions of which they had the control. The referee in the case found that those companies acquired under their arrangement the power to control the entire market for bituminous coal in the northern part of the state, and their combination was, therefore, a restraint upon trade, and against public policy. In response to the suggestion that the real purpose of the combination was to lessen expenses, to advance the quality of coal, and to deliver it in the markets intended to be supplied in the best order to the consumer, the Supreme Court of Pennsylvania said: "This is denied by the defendants, but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal field; that it is the great source of supply of bituminous coal to the state of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel, and this is accomplished by a combination of all the companies engaged in this branch of business in the large region where they operate. The combination is wide in scope, general in its influence and injurious in effects. These being its features, the contract is against public policy, illegal, and, therefore, void." Again, in the same case: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a corrective in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a

power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise; or, if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. 'I take it,' said Gibson, J., 'a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or of mischief.' *Com. v. Carlisle*, Brightly N. P. 40. In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent." "There is a potency in numbers when combined which the law cannot overlook, where injury is the consequence."

This case in the Supreme Court of Pennsylvania was cited with approval in *Arnot v. Coal Co.*, 68 N. Y. 558, 565, which involved the validity of a contract between two coal companies, the object and effect of which were to give one of them the monopoly of the trade in coal in a particular region, by which the price of that commodity could be artificially enhanced. The Court of Appeals of New York held that: "A combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy and, therefore, illegal. * * * If they should be sustained the prices of articles of pure necessity, such as coal, flour and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited." See, also, *Hooker v. Vandewater*, 4 Denio, 352; *Stanton v. Allen*, 5 Denio, 434; *Bank v. King*, 44 N. Y. 87.

In *Salt Co. v. Guthrie*, 85 Ohio St. 666, 672, the principal question was as to the legality of an association of substantially all the manufacturers of salt in a large salt-producing territory. After adverting to the rule that contracts in general restraint of trade are against public policy, and to the agreement there in question, the court said: "Public policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance market prices to the injury of the general public. * * * The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, on grounds of public policy, the courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity

was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Craft v. McConoughy*, 79 Ill. 346, 349, 350, which related to a combination between all the grain dealers of a particular town to stifle competition and to obtain control of the price of grain, the Supreme Court of Illinois said: "While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract and the other proof in the record, it is apparent that the true object was to form a secret combination which would stifle all competition and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country. That the effect of this contract was to restrain the trade and commerce of the country is a proposition that cannot be successfully denied. We understand it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good where the restraint was only partial, consideration adequate and the restriction reasonable." "While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free the interest of the public was safe. The laws of trade, in connection with the right of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection."

These principles were applied in *People v. Chicago Gas Trust Co.*, 130 Ill. 269, 292, 297; 22 N. E. Rep. 798, which involved the validity of a corporation formed for the purpose of operating gas works, and of manufacturing and selling gas, and which, for the purpose of destroying competition, acquired the stock of four other gas companies, and thereby obtained a monopoly in the business of furnishing illuminating gas to the city of Chicago and its inhabitants. The court, in declaring the organization of the company to be illegal, said: "The fact that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago." "Of what avail," said the court, "is it that any number of gas companies may be formed under the General Incorporation Law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?"

So, in *Association v. Kock*, 14 La. Ann. 168, where the court passed upon the legality of an association of various commercial firms in New Orleans that

were engaged in the sale of India bagging, it was said: "The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Lumber Co. v. Hayes*, 76 Cal. 387, 390; 18 Pac. Rep. 391, which related to a combination, the result of certain contracts among certain manufacturers, the court found that the object, purpose and consideration of those contracts were to form a combination among all the manufacturers of lumber at or near a particular place, for the sole purpose of increasing the price of that article, limiting the amount to be manufactured, and giving certain parties the control of all lumber manufactured near that place for the year 1881, and of the supply for that year in specified counties. It held the combination to be illegal, observing that "among the contracts illegal at common law, because opposed to public policy, were contracts in general restraint of trade, contracts between individuals to prevent competition and keep up the prices of articles of utility." It further said that while the courts had nothing to do with the results naturally flowing from the laws of demand and supply, they would not respect agreements made for the purpose of "taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities."

A leading case on the question as to what combinations are illegal as being in general restraint of trade is *Richardson v. Buhl*, 77 Mich. 632, 635, 657, 660; 43 N. W. Rep. 1102, which related to certain agreements connected with the business and operations of the Diamond Match Company. From the report of the case it appears that that company was organized, under the laws of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States, and to monopolize and control the business of making all the friction matches in the country, and establish the price thereof. To that end it became necessary, among other things, to buy many plants that had become established or were about to be established, as well as the property used in connection therewith. Chief Justice SHERWOOD of the Supreme Court of Michigan said: "The sole object of the corporation is to make money by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation—an artificial person governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 people. The article thus completely under their control for the last fifty years has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes and in carrying out its object that the contract in this case was made between those parties, and which we are now asked to aid in enforcing. Monopoly in trade, or in any kind of business in

this country, is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provisions in several of our State Constitutions. * * * All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts."

In the same case Mr. Justice CHAMPLIN, with whom Mr. Justice CAMPBELL concurred, said: "There is no doubt that all the parties to this suit were active participants in perfecting the combination called the Diamond Match Company, and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful and against public policy." See, also, *Raymond v. Leavitt*, 46 Mich. 447; 9 N. W. Rep. 525; and *Oil Co. v. Adoue*, 88 Tex. 650; 19 S. W. Rep. 274.

This extended reference to adjudged cases relating to unlawful restraints upon the interior traffic of a state has been made for the purpose of showing that a combination such as that organized under the name of the American Sugar Refining Company has been uniformly held by the courts of the states to be against public policy, and illegal, because of its necessary tendency to impose improper restraints upon trade. And such, I take it, would be the judgment of any Circuit Court of the United States in a case between parties in which it became necessary to determine the question. The judgments of the state courts rest upon general principles of law, and not necessarily upon statutory provisions expressly condemning restraints of trade imposed by or resulting from combinations. Of course, in view of the authorities, it will not be doubted that it would be competent for a state, under the power to regulate its domestic commerce, and for the purpose of protecting its people against fraud and injustice, to make it a public offense, punishable by fine and imprisonment, for individuals or corporations to make contracts, form combinations or engage in conspiracies, which unduly restrain trade or commerce carried on within its limits, and also to authorize the institution of proceedings for the purpose of annulling contracts of that character, as well as of preventing or restraining such combinations and conspiracies.

But there is a trade among the several states which is distinct from that carried on within the territorial limits of a state. The regulation and control

of the former are committed by the National Constitution to congress. Commerce among the states, as this court has declared, is a unit, and in respect of that commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot interfere with the enforcement of such rules. The jurisdiction of the general government extends over every foot of territory within the United States. Under the power with which it is invested, congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the states. In so doing it would not interfere with the "autonomy of the states," because the power thus to protect interstate commerce is expressly given by the people of all the states. Interstate intercourse, trade and traffic are absolutely free, except as such intercourse, trade or traffic may be incidentally or indirectly affected by the exercise by the states of their reserved police powers. *Sherlock v. Alling*, 99 U. S. 99, 103. It is the Constitution, the supreme law of the land, which invests congress with power to protect commerce among the states against burdens and exactions arising from unlawful restraints by whatever authority imposed. Surely, a right secured or granted by that instrument is under the protection of the government which that instrument creates. Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other states, or to be carried to other states — a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition — affects, not incidentally, but directly, the people of all the states; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch v. Maryland*, 4 Wheat. 405.

It has been argued that a combination between corporations of different states, or between the stockholders of such corporations, with the object and effect of controlling not simply the manufacture, but the price, of refined sugar throughout the whole of the United States — which is the case now before us — cannot be held to be in restraint of "commerce among the states," and amenable to national authority, without conceding that the general government has authority to say what shall and what shall not be manufactured in the several states. *Kidd v. Pearson*, 128 U. S. 1, 20; 9 Sup. Ct. Rep. 6, was cited in argument as supporting that view. In that case the sole question was whether the state of Iowa could forbid the manufacture within its limits of ardent spirits intended for sale ultimately in other states. This court held that the manufacture of intoxicating liquors in a state is none the less a business within the state, subject to state control, because the manufacturer may intend, at his convenience, to export such liquors to foreign countries or to other states. The authority of the states over the manufacture of strong drinks within their respective jurisdictions was referred to their plenary power, never surrendered to the national government, of providing for the health, morals and safety of their people.

That case presented no question as to a combination to monopolize the sale of ardent spirits manufactured in Iowa to be sold in other states — no ques-

tion as to combinations in restraint of trade as involved in the buying and selling of articles that are intended to go, and do go, and will always go, into commerce throughout the entire country, and are used by the people of all the states, and the making or manufacturing of which no state could forbid consistently with the liberty that every one has of pursuing, without undue restrictions, the ordinary callings of life. There is no dispute here as to the lawfulness of the business of refining sugar, apart from the undue restraint which the promoters of such business, who have combined to control prices, seek to put upon the freedom of interstate traffic in that article.

It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid, the mere refining of sugar in any state, would be in excess of any power granted to congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at combinations that unduly restrain, because they monopolize, the buying and selling of articles which are to go into interstate commerce. In *State v. Stewart*, 59 Vt. 273, 286; 9 Atl. Rep. 559, it was said that if a combination of persons "seek to restrain trade, or tend to the destruction of the material property of the country, they work injury to the whole people." And in *State v. Glidden*, 55 Conn. 46, 75; 8 Atl. Rep. 890, the court said: "Any one man, or any one of several men acting independently, is powerless; but when several combine, and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its number increases. * * * The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime." Chief Justice GIBSON well said, in *Com. v. Carlisle*, Brightly N. P. 36, 39, 40: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest, or that of any other individual, beyond the limits of fair competition; but the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." These principles underlie the act of congress, which has for its sole object the protection of such trade and commerce as the Constitution confides to national control, and the question is presented whether the combination assailed by this suit is an unlawful restraint upon interstate trade in a necessary article of food which, as every one knows, has always entered, now enters, and must continue to enter, in vast quantities, into commerce among the states.

In *Kidd v. Pearson* we recognized, as had been done in previous cases, the distinction between the mere transportation of articles of interstate commerce and the purchasing and selling that precede transportation. It is said that manufacture precedes commerce, and is not a part of it. But it is equally

true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation, and are as much commercial intercourse, where articles are bought to be carried from one state to another, as is the manual transportation of such articles after they have been so purchased. The distinction was recognized by this court in *Gibbons v. Ogden*, where the principal question was whether commerce included navigation. Both the court and counsel recognized buying and selling or barter as included in commerce. Chief Justice MARSHALL said that the mind can scarcely conceive a system for regulating commerce, which was "confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter." 9 Wheat. 189, 190.

The power of congress covers and protects the absolute freedom of such intercourse and trade among the states as may or must succeed manufacture and precede transportation from the place of purchase. This would seem to be conceded, for the court in the present case expressly declare that "contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce." Here is a direct admission — one which the settled doctrines of this court justify — that contracts to buy, and the purchasing of goods to be transported from one state to another, and transportation, with its instrumentalities, are all parts of interstate trade or commerce. Each part of such trade is then under the protection of congress. And yet, by the opinion and judgment in this case, if I do not misapprehend them, congress is without power to protect the commercial intercourse that such purchasing necessarily involves against the restraints and burdens arising from the existence of combinations that meet purchasers, from whatever state they come, with the threat — for it is nothing more nor less than a threat — that they shall not purchase what they desire to purchase, except at the prices fixed by such combinations. A citizen of Missouri has the right to go in person, or send orders, to Pennsylvania and New Jersey for the purpose of purchasing refined sugar. But of what value is that right if he is confronted in those states by a vast combination, which absolutely controls the price of that article by reason of its having acquired all the sugar refineries in the United States in order that they may fix prices in their own interest exclusively?

In my judgment, the citizens of the several states composing the Union are entitled of right to buy goods in the state where they are manufactured, or in any other state, without being confronted by an illegal combination whose business extends throughout the whole country, which, by the law everywhere, is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the states cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one state to another, may be reached by

congress under its authority to regulate commerce among the states. The exercise of that authority so as to make trade among the states in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations is justified by an express grant of power to congress, and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the states, especially as that result cannot be attained through the action of any one state.

Undue restrictions or burdens upon the purchasing of goods in the market for sale, to be transported to other states, cannot be imposed even by a state without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a state within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar to be transported to other states, how comes it that combinations of corporations or individuals within the same state may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article to be carried from the state in which such purchases are made? If the material power is competent to repress state action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one state to another state, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise illegal combinations of corporations or individuals may — so far as national power and interstate commerce are concerned — do with impunity what no state can do.

Suppose that a suit were brought in one of the courts of the United States — jurisdiction being based, it may be, alone upon the diverse citizenship of the parties — to enforce the stipulations of a written agreement, which had for its object to acquire the possession of all the sugar refineries in the United States in order that those engaged in the combination might obtain the entire control of the business of refining and selling sugar throughout the country, and thereby to increase or diminish prices as the particular interests of the combination might require. I take it that the court, upon recognized principles of law common to the jurisprudence of this country and of Great Britain, would deny the relief asked and dismiss the suit upon the ground that the necessary tendency of such an agreement and combination was to restrain not simply trade that was completely internal to the state in which the parties resided, but trade and commerce among all the states, and was, therefore, against public policy and illegal. If I am right in this view, it would seem to follow, necessarily, that congress could enact a statute forbidding such combinations so far as they affected interstate commerce, and provide for their suppression as well through civil proceedings instituted for that purpose as by penalties against those engaged in them.

In committing to congress the control of commerce with foreign nations and among the several states, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power, except those arising

from the general nature of the government, or such as are embodied in the fundamental guaranties of liberty and property. It gives to congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief Justice MARSHALL three-quarters of a century ago, and which has been repeatedly affirmed by this court. That rule is: "The sound construction of the Constitution must allow to the national legislature the discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *M'Culloch v. Maryland*, 4 Wheat. 316, 421. The end proposed to be accomplished by the act of 1890 is the protection of trade and commerce among the states against unlawful restraints. Who can say that that end is not legitimate, or is not within the scope of the Constitution? The means employed are the suppression, by legal proceedings, of combinations, conspiracies and monopolies which, by their inevitable and admitted tendency, improperly restrain trade and commerce among the states. Who can say that such means are not appropriate to attain the end of freeing commercial intercourse among the states from burdens and exactions imposed upon it by combinations which, under principles long recognized in this country, as well as at the common law, are illegal and dangerous to the public welfare? What clause of the Constitution can be referred to which prohibits the means thus prescribed in the act of congress?

It may be that the means employed by congress to suppress combinations that restrain interstate trade and commerce are not all or the best that could have been devised. But congress, under the delegation of authority to enact laws necessary and proper to carry into effect a power granted, is not restricted to the employment of those means "without which the end would be entirely unattainable." "To have prescribed the means," this court has said, "by which government should, in all future time, execute its powers, would have been to change entirely the character of that instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *M'Culloch v. Maryland*, 4 Wheat. 316, 415, 423.

By the act of 1890, congress subjected to forfeiture "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country." It was not deemed wise to subject such property to forfeiture before transportation began or after it ended. If it be suggested that congress might have prohibited the transportation from the state in which they are manufactured any articles, by whomsoever at the time owned, that had been manufactured by combinations formed to monopolize some designated part of trade or commerce among the states, my answer is that it is not within the functions of the judiciary to adjudge that congress shall employ particular means in execution of a given power, simply because such means are, in the judgment of the courts, best conducive to the end sought to be accomplished. Congress, in the exercise of its discretion as to choice of means conducive to an end to which it was competent, determined to reach that end through civil proceedings, instituted to prevent or restrain these obnoxious combinations in their attempts to burden interstate commerce by obstructions that interfere in advance of transportation with the free course of trade between the people of the states. In other words, congress sought to prevent the coming into existence of combinations, the purpose or tendency of which was to impose unlawful restraints upon interstate commerce.

There is nothing in conflict with these views in *Coe v. Errol*, 116 U. S. 517; 6 Sup. Ct. Rep. 475. There the question was whether certain logs cut in New Hampshire, and hauled to a river that they might be transported to another state, were liable to be taxed in the former state before actual transportation to the latter state began. The court held that the logs might be taxed while they remained in the state of their origin as part of the general mass of property there; that "for this purpose" (taxation) the property did not pass from the jurisdiction of the state in which it was until transportation began. The scope of the decision is clearly indicated by the following clause in the opinion of Mr. Justice BRADLEY: "How can property thus situated, to wit, deposited or stored at the place of entrepot for future exportation, be taxed in the regular way as part of the property of the state? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed or assessed for taxation in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its situation." As we have now no question as to the taxation of articles manufactured by one of the combinations condemned by the act of congress, and as no one has suggested that the state in which they may be manufactured could not tax them as property so long as they remained within its limits, and before transportation of them to other states began, I am at a loss to understand how the case before us can be affected by a decision that personal property, while it remains in the state of its origin, although it is to be sent at a future time to another state, is within the jurisdiction of the former state for purposes of taxation.

The question here relates to restraints upon the freedom of interstate trade and commerce imposed by illegal combinations. After the fullest consideration I have been able to bestow upon this important question, I find it impossible

to refuse my assent to this proposition: Whatever a state may do to protect its completely interior traffic or trade against unlawful restraints, the general government is empowered to do for the protection of the people of all the states—for this purpose, one people—against unlawful restraints imposed upon interstate traffic or trade in articles that are to enter into commerce among the several states. If, as already shown, a state may prevent or suppress a combination, the effect of which is to subject its domestic trade to the restraints necessarily arising from their obtaining the absolute control of the sale of a particular article in general use by the community, there ought to be no hesitation in allowing to congress the right to suppress a similar combination that imposes a like unlawful restraint upon interstate trade and traffic in that article. While the states retain, because they have never surrendered, full control of their completely internal traffic, it was not intended by the framers of the Constitution that any part of interstate commerce should be excluded from the control of congress. Each state can reach and suppress combinations so far as they unlawfully restrain its interior trade, while the national government may reach and suppress them so far as they unlawfully restrain trade among the states.

While the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed, for it is, in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one state to be carried to another state as necessarily arise from the existence of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the states. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one state to another state. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one state only, but throughout the entire country, in the buying and selling of articles—especially the necessities of life—that go into commerce among the states. The doctrine of autonomy of the states cannot properly be invoked to justify a denial of the power in the national government to meet such an emergency, involving, as it does, that freedom of commercial intercourse among the states which the Constitution sought to attain.

It is said that there are no proofs in the record which indicate an intention upon the part of the American Sugar Refining Company and its associates to put a restraint upon trade or commerce. Was it necessary that formal proof be made that the persons engaged in this combination admitted in words that they intended to restrain trade or commerce? Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain interstate trade or commerce? Men who form and control these combinations are too cautious and wary to make such admissions orally or in writing. Why, it is conceded that the object of this combination was to obtain control of the business of making and selling

refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object is disclosed upon the very face of the transactions described in the bill. And it is proved — indeed, is conceded — that that object has been accomplished to the extent that the American Sugar Refining Company now controls ninety-eight per cent of all the sugar refining business in the country, and, therefore, controls the price of that article everywhere. Now, the mere existence of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law — there being no adjudged case to the contrary in this country — a direct restraint of trade in the article for the control of the sales of which in this country that combination was organized. And that restraint is felt in all the states, for the reason, known to all, that the article in question goes, was intended to go and must always go, into commerce among the several states, and into the homes of people in every condition of life.

A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one state to another without buyers being burdened by unlawful restraints imposed by combinations of corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the states, and protect the people of all the states against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the states, may pass under the absolute control of overshadowing combinations having financial resources without limit, and an audacity in the accomplishment of their objects that recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness, so powerful that no single state is able to overthrow them, and give the required protection to the whole country, and so all-pervading that they threaten the integrity of our institutions.

We have before us the case of a combination which absolutely controls, or may, at its discretion, control, the price of all refined sugar in this country. Suppose another combination, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power — one that is capable of executing its sovereign authority throughout every part of the territory and over all the people of the nation?

To the general government has been committed the control of commercial intercourse among the states, to the end that it may be free at all times from any restraints except such as congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one

that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one state. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. "Powerful and ingenious minds," this court has said, "taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived." *Gibbons v. Ogden*, 9 Wheat. 1, 222.

While a decree annulling the contracts under which the combination in question was formed may not, in view of the facts disclosed, be effectual to accomplish the object of the act of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the states, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed, or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which congress intended to accomplish, namely, to protect the freedom of commercial intercourse among the states against combinations and conspiracies which impose unlawful restraints upon such intercourse.

For the reasons stated, I dissent from the opinion and judgment of the court. *United States v. E. C. Knight & Co.*, 15 Sup. Ct. Rep. 249.

2. Decisions under the Federal Anti-Trust Act.—Cases involving the sufficiency of indictments or informations under the act, and also its scope and construction: *United States v. Greenhut*, 50 Fed. Rep. 469; *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed. Rep. 213; *In re Greene*, 52 Fed. Rep. 104; *United States v. Patterson*, 54 Fed. Rep. 1005; S. C., 55 Fed. Rep. 605; 59 Fed. Rep. 280; *United States v. Agler*, 62 Fed. Rep. 824. Charges to grand jury in regard to offenses under the act—strike cases: *In re Charge to Grand Jury*, 62 Fed. Rep. 828; *In re Grand Jury*, 62 Fed. Rep. 834; *In re Grand Jury*, 62 Fed. Rep. 840; *United States v. Deba*, 63 Fed. Rep. 436. Bills to enjoin violations of act and contempt cases growing out of such injunctions: *United States v. Jellico Mt. Coal & Coke Co.*, 46 Fed. Rep. 432; *Toledo, Ann Arbor & North. Mich. R. Co. v. Pennsylvania R. Co.*, 54 Fed. Rep. 730; 54 Fed. Rep. 746; *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; *United States v. Trans-Missouri Freight Assn.*, 53 Fed. Rep. 440; 58 Fed. Rep. 58; 8 Am. R. R. & Corp. Rep. 528; *United States v. Elliott*, 62 Fed. Rep. 801; *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. Rep. 803.

See, also, *American Biscuit Mfg. Co. v. Klotz*, 44 Fed. Rep. 721; *Dueber*

Watch Case Mfg. Co. v. E. Howard Watch & Clock Co., 55 Fed. Rep. 851. The decisions of the principal case in the lower courts are reported in 60 Fed. Rep. 806, 934; 9 C. C. A. 297.

Private parties cannot enjoin violations of the act, their only remedy being to sue for damages. *Blindell v. Hagan*, 54 Fed. Rep. 50; 56 Fed. Rep. 696; 6 C. C. A. 86; *Piddock v. Harrington*, 64 Fed. Rep. 821.

8. Trusts and combinations to monopolize trade and production and prevent competition.—See the following cases and notes thereto: *Chicago, M. & St. P. R. Co. v. Wabash, etc., R. Co.*, ante, p. 178; *Oakdale Mfg. Co., v. Garst*, ante, p. 181; *Nester v. Continental Brewing Co.*, ante, p. 205; *Jackson v. Stanfield*, ante, p. 214. On contracts in restraint of trade see *Richards v. Am. Desk & Seating Co.*, ante, p. 99; *Gamewell Fire Alarm Tel. Co. v. Crane*, ante, p. 78.

STATE V. NELSON.

(Supreme Court of Ohio, December 11, 1894.)

STREET RAILWAYS. STATUTORY REGULATION. PROTECTING MOTORMAN FROM THE WEATHER. The act of the general assembly of Ohio, entitled "An act requiring persons, associations and corporations owning or operating street cars to provide for the well-being of employees," which requires the forward end of electric cars to be provided with a screen of glass or other material that will protect the motorman from wind and storm, is not in conflict with section 26, article 2 of the Constitution of this state, which provides that "all laws of a general nature shall have a uniform operation throughout the state." Neither is it in conflict with section 1 of the fourteenth amendment to the Constitution of the United States.

SAMUEL L. NELSON was indicted for permitting an electric car to remain without the screen required by statute for the protection of the motorman. Defendant demurred to the indictment on the ground that the statute under which it was found was unconstitutional. The court sustained the demurrer and the prosecuting attorney excepted.

Charles Stewart, Prosecuting Attorney. Oscar T. Martin, appointed to argue against the exceptions.

BURKET, J. The statute in question is as follows:

"An act requiring persons, associations and corporations owning or operating street cars to provide for the well-being of the employees.

“Section 1. Be it enacted by the general assembly of the state of Ohio, that every electric street car, other than trail cars, which are attached to motor cars, shall be provided during the months of November, December, January, February and March of each year, at the forward end, with a screen constructed of glass or other material, which shall fully and completely protect the driver or motorman or gripman, or other person stationed on the forward end guiding and directing the motor power by which they are propelled, from wind and storm.

“Sec. 2. Any person, agent or officer of any association or corporation violating the provisions of this act shall, on conviction, be fined in any sum not less than \$25.00 nor more than \$100, for each day each car belonging to and used by any such person, association or corporation is directed or permitted to remain unprovided with the screen required in section 1 of this act, and it is hereby made the duty of the prosecuting attorney of each county in this state to institute the necessary proceedings to enforce the provisions of this act.

“Sec. 3. This act shall take effect and be in force on and after November 1, A. D. 1893.”

It is claimed that this act is in conflict with that part of section 26 of article 2 of the Constitution which provides that “all laws of a general nature shall have a uniform operation throughout the state.” The act in question is clearly of a general nature, so that the only inquiry left is whether it is of uniform operation throughout the state. And here again it is equally clear that the law is in operation throughout every part of the state, uniformly as to all classes therein named. Is this sufficient? Soon after the adoption of the Constitution it was said by this court that the scope and purpose of this section was to prevent laws of a general nature from being in force in some counties and not in others. and these early cases have been followed ever since. So held in *Cass v. Dillon*, 2 Ohio St. 607, 617; *Lehman v. McBride*, 15 Ohio St. 573; *McGill v. State*, 34 Ohio St. 228, 248; and *Ex parte Falk*, 42 Ohio St. 638, 641. In *McGill v. State*, 34 Ohio St., *BOYNTON, J.*, on page 238, quotes what was said by *THURMAN, J.*, in *Cass v. Dillon*, 2 Ohio St. 617, and, after referring to the debates of the constitutional convention as to this section of the Constitution, says: “A general law that land should not be

sold upon execution for less than two-thirds of its appraised value was excluded from operation in several counties by local enactment. There were different laws in different counties respecting the descent and distribution of intestate property. Some statutes defining legal offenses were excluded in their operation from a large part of the state, and different penalties for a violation of the same act were in some instances provided for different localities. These are examples of the legislation, to prevent which in the future, and the mischief resulting from it, this provision of the Constitution was adopted ; but no wider scope was claimed for it than to guard the future against the evils and inequalities resulting from legislation of the character complained of."

Of late years an effort has frequently been made to claim for this section of the Constitution a wider scope than to guard against the evils resulting from legislation of the character mentioned by THURMAN, J., in *Cass v. Dillon*, SCOTT, J., in *Lehman v. McBride*, BOYNTON, J., in *McGill v. State*, and OKEY, J., in *Ex parte Falk* ; but such efforts have uniformly failed. The only statutes which have been declared in conflict with this section of the Constitution are statutes making different classes of different parts of the territory of the state, such as cities, villages, etc. This section of the Constitution requires that laws of a general nature shall have not only an operation, but a uniform operation, throughout the state ; that is, the whole state, and not only in one or more counties. The operation must be uniform upon the subject-matter of the statute. It cannot operate upon the named subject-matter in one part of the state differently from what it operates upon it in other parts of the state ; that is, the law must operate uniformly upon the named subject-matter in every part of the state, and when it does that it complies with this section of the Constitution. That this is the scope and purpose of this section appears from its language, the debates of the constitutional convention, and the uniform construction placed thereon by this court in the cases above cited, and others hereinafter referred to. As the statutes affecting different cities and villages of different classes practically do not operate in every part of the state, but only where a city or village of the particular class is found, it might seem that such laws do not operate uniformly throughout the state. A moment's reflection will show that this

is not so. If a new city or village of a particular class should be built up in the wildest spot in the state, the statutes applicable to such class of cities or villages would be found to be in force there; and in that sense all statutes applicable to different classes of cities and villages are in uniform operation in every part of the state. The classification of cities and villages is in its nature territorial, and this court has uniformly held that such classification must be reasonable, and not arbitrary. On the other hand, statutes as to rights of persons and property usually are, and in their nature must be, arbitrary. Very few statutes apply equally to every person in the state. Some apply only to males, some to females, some to minors, some to persons of unsound mind, some to officeholders and some to criminals. As pointed out by MINSHALL, J., in *Adler v. Whitbeck*, 44 Ohio St. 539; 9 N. E. Rep. 672, such classes are arbitrarily formed by the general assembly; and, "if the legislature has erred in not including what has been excepted from the operation of the law, it is simply an error of judgment in the exercise of its authority, and cannot be reviewed by the courts." In *Adler v. Whitbeck*, supra, an effort was made to have the statute there under consideration declared unconstitutional because its classification included saloons, and excluded distilleries and breweries, but the effort failed. A similar effort was made in *Senior v. Ratterman*, 44 Ohio St. 661; 11 N. E. Rep. 321, because wholesale dealers and manufacturers were not included within the same class, and the effort again failed. A similar effort was made in *State v. Turnpike Co.*, 37 Ohio St. 481, as to the classification of turnpikes, and the effort again failed. The Court of Appeals of the state of New York, under a similar provision as to general laws, holds that the courts cannot control such classifications made by the legislature. In *re New York El. R. R. Co.*, 70 N. Y., the court, on page 351, say: "Can a court take proof for the purpose of showing a statute valid and regular upon its face to be unconstitutional? And does the validity of a law which is required to be general, and which is general in its terms, depend upon the number of subjects upon which it can operate, or upon the size of a class to which it applies? These questions must be answered in the negative."

In Iowa the language of the Constitution is as follows: "All laws of a general nature shall have a uniform operation; the gen-

eral assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Const. art. 1, § 6. It will be noticed that the words "throughout the state" are not contained in the Iowa Constitution, and that, unlike our Constitution, it prohibits the general assembly from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. In this latter regard, the scope of the Iowa Constitution is broader than our own. Decisions under the Iowa Constitution, therefore, can throw no light upon the proper construction to be placed upon this section of our Constitution. The Constitution of California provides in this regard as follows: "All laws of a general nature shall have a uniform operation." Const. art. 1, § 11. As to this part of the California Constitution, and as to the similar provision in our own, OKEY, J., in *Ex parte Falk*, 42 Ohio St. 641, says: "And in this connection it is proper to refer to the origin of the constitutional provision in question. We find that it was suggested by a provision in the Constitution of California, which provision, however, had not been construed when our Constitution was adopted. But the California Constitution did not contain the words "throughout the state." They were added to our Constitution, on motion, while the provision was under consideration in the convention (2 Debates, 579); and the absence of these words was made the ground of decisions in California which would never have been made if the Constitution of that state had contained these words." This quotation from the opinion of OKEY, J., shows that the decisions under the California Constitution cannot be regarded as criteria in the interpretation of our own as to this section. The words "throughout the state" imply a limitation in one respect, and give an extended scope in another, not possessed by Constitutions of other states not having those words. The scope and force of this section of our Constitution being as herein indicated, it is clear that the statute in question is not in conflict therewith. The statute is in operation in every part of the state, and operates uniformly upon the classes of persons therein designated in every part of the state. The act is clearly authorized as a police regulation to protect the health, and promote the comfort, of those engaged in operating electric

cars. If there are other persons requiring protection, such protection should be sought through the general assembly by increasing the protected class, rather than by removing all protection through the action of the courts.

There is another reason why this statute cannot be declared unconstitutional. While a statute must stand or fall by its operation, rather than by its mere form, yet in passing upon the constitutionality of a statute a court can judge of its operations only through facts of which it can take judicial notice. A court cannot take testimony to determine the operation of a statute, and thereby declare it unconstitutional. Neither can a court judicially know that a cable car or a horse car is so constructed and operated as to require the same means of protection for the operatives as is required on electric cars. The appliances and construction of cars, and in fact all kinds of machinery, are continually changing, and it is within the exclusive authority of the general assembly, in the exercise of its police power, to determine by general laws what, if any, regulations are required for the protection of the health, safety and comfort of the operatives. Many citations have been made in the briefs of counsel from the Federal courts, under the 1st section of the fourteenth amendment to the Constitution of the United States. The force and scope of this section are very different from section 26 of article 2 of the Constitution of our own state. Without going into an extended examination of this amendment, it is sufficient to say that the statute in question is not in conflict therewith, as clearly appears from the following authorities: *Barber v. Connelly*, 113 U. S. 27-31; 5 Sup. Ct. Rep. 357; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 238; 10 Sup. Ct. Rep. 533; *Gozza v. Tiernan*, 148 U. S. 657, 662; 13 Sup. Ct. Rep. 721; *The Truck Store* cases, in Illinois (141 Ill. 171; 31 N. E. Rep. 395), and the *Script* cases, in West Virginia (33 W. Va. 179, 188; 10 S. E. Rep. 285, 288), have no application to the question in this case. The conclusion, therefore, is that the act in question is a valid law, and that the Court of Common Pleas erred in sustaining the demurrer to the indictment. The exceptions of the prosecuting attorney are, therefore, sustained.*

* Reported in 39 N. E. Rep. 22.

Street railways — validity of legislation requiring cars to be so constructed and equipped as to protect the motorman from the weather. — An act similar to the one involved in the principal case was sustained in *State v. Hoskins*, (Minn.) 59 N. W. Rep. 545. The act applied to cable, electric and steam street railways. Its validity was assailed upon the following grounds: First. That it is not an exercise of the police power of the state. Second. It is class legislation. Third. It impairs the obligation of a contract. Fourth. It interferes with the liberty of the contract between street railway companies and their employees. Fifth. It imposes an excessive fine. These grounds were all considered and overruled.

Street railway companies may be compelled to have a driver and conductor on each car. *South Covington & C. St. R. Co. v. Berry*, 6 Am. R. R. & Corp. Rep. 258, and note. The rates of fare, sale of tickets and running of cars may be regulated. *Sternberg v. State*, 7 Am. R. R. & Corp. Rep. 579, and note. See, generally, as to legislative control and regulation, *American Rapid Tel. Co. v. Hess*, 4 Am. R. R. & Corp. Rep. 199, and note; *New York & N. E. R. Co. v. Town of Bristol*, 9 Am. R. R. & Corp. Rep. 593, and note.

BIGELOW v. WEST END ST. RY. CO.

(Supreme Judicial Court of Massachusetts, May 18, 1894.)

STREET RAILROAD. STOPPING CAR OVER EXCAVATION FOR PASSENGER TO ALIGHT. FAILURE TO GIVE WARNING. Employees on a street car have a right to assume that a passenger, in alighting from the car in broad daylight, will notice an excavation in the street, caused by the removal of paving blocks; and the company is not chargeable with negligence because they stopped the car near the excavation, or because they failed to caution the passenger as to the condition of the street.

Hesseltine & Hesseltine, for plaintiff. *M. F. Dickinson, Jr.*, for defendant.

LATHROP, J. This is an action for personal injuries sustained by the plaintiff while leaving an open electric car of the defendant on Charles street, in Boston, near Chestnut street, between nine and ten o'clock in the morning of July 14, 1892. Charles street runs north and south, and is crossed at right angles by Mt. Vernon street, Chestnut street and Beacon street — the first street named being north of Chestnut street, and the last south of it. The car was going in a southerly direction. The seats in the car

ran across it, and the plaintiff, before she attempted to leave the car, sat on the westerly side of the car, about the third seat from the front. The street pavement had been removed by the city of Boston, on the westerly side of the track, all of the way from Mt. Vernon street to Beacon street, with the exception of the crossing at Chestnut street, and in front of the door of a stable near Beacon Street. The new roadbed had been partially completed — that is, the foundation of it, consisting of rubble and cement, with sand on top, had been laid — but the paving blocks, which are about six inches in depth, had not been laid. There are two car tracks on Charles street, and the pavement between the westerly rail and the easterly side of the street was in place. On getting near to Chestnut street, which was a regular stopping place, the plaintiff motioned to the conductor to stop the car. He gave a signal, accordingly, to the motorman, and the car was slowed up gradually, and was stopped with its rear platform some feet over the crossing of Chestnut street, and opposite the excavation. The plaintiff testified that she had a parcel of sulky seats, which she put under her left arm, took her lunch bag in her left hand, and took hold of the handle of the seat on which she had been sitting with her right hand, glanced around to see if there were any carriages coming, and stepped off, but did not look to see where she was stepping; that there was nothing to prevent her seeing the excavation, if she had looked; that she put her right foot on to the running board, and her left foot towards the ground, and fell on her left side. She also testified that she did not know that the excavation was there, and that she knew that the car could not stop on an intersecting street. A regulation of the board of aldermen of the city of Boston was put in evidence, which provides as follows: "No person having the control of the speed of a street railway car shall stop any such car on a crosswalk or in front of an intersecting street except to avoid collisions or to prevent danger to persons in the street."

At the close of the evidence the presiding justice directed a verdict for the defendant; and the case comes before us on the plaintiff's exceptions to this direction, and to the exclusion of two questions put to the plaintiff by her counsel, which related to her knowledge of the place of the accident on previous occasions. These questions are material only upon the point whether the

plaintiff was in the exercise of due care. But it is unnecessary to consider them or to determine whether there was sufficient evidence to warrant a jury in finding that she was in the exercise of due care, as we are of opinion that the exceptions show no evidence of negligence on the part of the defendant. A passenger on a street car has no right to expect that the street between the track and the sidewalk shall be in such a condition that he can safely pass over it. When he leaves the car he ceases to be a passenger, and becomes merely a traveler upon the highway. *Creamer v. Railway Co.*, 156 Mass. 320; 31 N. E. Rep. 391. The plaintiff, however, contends that, as there was evidence that the conductor and motorman knew the condition that the street was in, they ought not to have stopped the car where they did, or should have cautioned the plaintiff not to get off on the westerly side or have stopped on Chestnut street. It is a sufficient answer to the last suggestion that the exceptions do not show that there was time to stop the car on Chestnut street after the plaintiff signified her desire to leave. So far as appears, the signal to stop was given at once, and the car slowed up in the usual manner. As to the other suggestions, we are of opinion that those in charge of the car had the right to assume that the plaintiff understood the situation. She sat on the side of the car next to the excavation, and had it in sight for some distance in going between Mt. Vernon street and Chestnut street. It was in the forenoon, and everything was plainly visible. The difference between the then level of the street and its former level was not so great as to render it especially hazardous for a passenger to leave the car there or to make it necessary for those in charge of the car to refuse to stop the car or to caution a passenger as to alighting. While we do not say that the plaintiff was negligent, as matter of law, in not looking to see where she was stepping, it is plain that a jury would be warranted in so finding; and it seems to us, in considering the question of the negligence of the defendant's servants, that they had a right to assume that the plaintiff would look and take heed unto her steps. The case differs widely from that of *Railway Co. v. Scott*, 86 Va. 902; 11 S. E. Rep. 404. In that case a closed street car stopped, in the nighttime, with its rear platform on the side of a trench, twelve or fourteen feet in length, fifteen feet deep and three feet

wide. A passenger stepped from the platform into the trench, and the defendant was held liable on the ground that the car ought not to have stopped there, or the plaintiff should have been warned and directed to leave the car by the other side. Exceptions overruled.*

1. Street railways — injury to passenger by stepping into hole in street while alighting from a moving car.—A petition claiming damages from a railroad company bound to keep its streets in repair, resulting from plaintiff's stepping into a hole in the crossing, dangerous and negligently left by the company, notwithstanding full notice, is not amenable to an exception of no cause of action, because it recites that the injury resulted while plaintiff was alighting from the car moving slowly and with slackening speed, preparatory to stopping, and also that plaintiff was an active and vigorous person, accustomed to alight in this way, and showing no unfavorable conditions tending to render the act exceptionally rash or hazardous. *Ober v. Crescent City R. Co.*, 44 La. Ann. 1059; 11 South. Rep. 818. It is well settled that it is not negligence in se, or as matter of law, for a person to get on or off a horse car while it is in motion; but the question of negligence vel non depends upon the circumstances of each particular case, such as the speed of the car, the activity or infirmity of the person and the like. *Ibid.*

2. Starting car while passenger in act of alighting.—It is the duty of a street railroad company to safely carry and deliver a passenger, and in doing so not only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger is about to alight, and not to start the car until he has alighted. *Washington & G. R. Co. v. Harmon's Admr.*, 147 U. S. 571; 18 Sup. Ct. Rep. 557. If a conductor of a street car negligently fails to observe whether a passenger has alighted, or, knowing that he has not, negligently starts the car with a sudden jerk, in consequence whereof the passenger is thrown from the step and injured, such negligence as might be imputed to the passenger in being upon the step at all cannot be properly considered as contributory negligence. *Ibid.* See, also, *Hill v. West End St. R. Co.*, 158 Mass. 458; 83 N. E. Rep. 582; *Gardner v. Detroit Street R. Co.*, 99 Mich. 182; 58 N. W. Rep. 49; *Piper v. Minneapolis St. R. Co.*, 52 Minn. 269; 53 N. W. Rep. 1060; *Buck v. People's Street Ry., etc. Co.*, 108 Mo. 179; 18 S. W. Rep. 1090.

Where plaintiff was injured by being thrown from defendant's street car by a sudden jerk of the car while preparing to get off, after having given the conductor a signal to stop, the question of plaintiff's contributory negligence is for the jury. *Bradley v. Fort Wayne & E. R. Co.*, 94 Mich. 35; 53 N. W. Rep. 915; *Linch v. Pittsburgh Traction Co.*, 153 Penn. St. 102; 25 Atl. Rep. 621.

In an action against a street car company for injuries received by a passenger in alighting, by a sudden starting of the car, it is competent for defendant to show that, by an ordinance under which its cars were operated, no car was

* Reported in 87 N. E. Rep. 367.

allowed to stop for passengers at the intersection of streets until it had reached the further side of the street crossed, and that, when plaintiff undertook to alight, the car had only slackened its speed to await a signal from the flagman. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199; 24 S. W. Rep. 192. Where a street car is stopped for a signal from the flagman before it reaches a crossing, and a passenger is about to alight, with the knowledge of the conductor, it is the latter's duty to give the passenger a reasonable opportunity to get off before starting the car. *Ibid.*

In an action by a passenger against a street railroad company for personal injuries, the court properly directed a verdict for defendant, where plaintiff was injured in attempting to get off a car while it was crossing a public street in violation of the rules of the company, none of the employees of the company having done anything to cause her to take the step. *Calderwood v. North Birmingham St. R. Co.*, 96 Ala. 818; 11 South. Rep. 66.

A conductor was held not negligent in starting a street car so as to throw off a passenger who was about to alight, when the car had waited a reasonable length of time for passengers to alight, the passenger had delayed, and was not apparently in the act of leaving the car when the signal to start was given, and the conductor had no knowledge of the passenger's desire to alight. *Gilbert v. West End St. R. Co.*, 160 Mass. 408; 86 N. E. Rep. 60.

3. Contributory negligence — failure to observe car passing in opposite direction.— Plaintiff's intestate stepped from an open car before it had stopped, and was struck and killed by an electric car coming from the opposite direction upon a parallel track. When he rose to leave the dashers of the two cars were opposite each other, the car which struck him was going at the rate of fifteen miles an hour, its gong was sounding, and there was nothing to prevent the intestate from seeing and hearing it. Before he left the car the conductor and a passenger both shouted to him to stop. Held, that a verdict was properly directed for defendant. *Creamer v. West End Street R. Co.*, 156 Mass. 820; 81 N. E. Rep. 391.

4. Termination of relation of passenger.— A passenger on a street car, who steps from the car into a public street, ceases to be a passenger the moment he leaves the car. *Creamer v. West End Street R. Co.*, 156 Mass. 820; 81 N. E. Rep. 391.

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2. A provision in the constitution of a building and loan association that "where it shall be ascertained" that the value of each share of stock amounts to \$200, a meeting of the shareholders shall be convened, at which time a division shall take place, etc., does not obligate a shareholder to abide by any particular mode of computation, or the mode adopted and used by the association in determining the value of his shares. 512.

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11. The act is not in conflict with the Federal Constitution, as interfering with interstate commerce, though it applies to tickets entitling the holder to travel on any railroad or steamboat, "whether the same be situated, operated or owned within or without the limits of this state." 451.

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for profit," public warehouses, and prescribing maximum rates of charges for storing and handling grain therein, is within the legitimate sphere of legislative power. 380.

2. Such act does not amount to a regulation of commerce among the states, or involve any deprivation of property without due process of law, or denial of the equal protection of the laws, even in its application to an elevator owner, whose principal business is storing his own grain, the storage of grain for others being a mere incident, and even though it provides that the grain is to be kept insured at the expense of the warehouseman. 380.

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3. A bridge was constructed across the Ohio river between the states of Ohio and Kentucky, by a company incorporated by the joint authority of both states, and authorized to collect certain tolls. Held, that traffic across the river was interstate commerce, and that one state could not regulate the charges for transportation thereon without the consent of congress or of the other state. 399.

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1. According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. 416.

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21. Variance between allegation and proof of corporate name. 663 note 9.

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2. Where the president is the managing officer of a corporation and, as such, negotiates and completes contracts on behalf of the corporation, he has power to bind the corporation by acknowledging an error in a contract and consenting to a change therein to correspond to the truth. 619 note 1.

3. The president, who is also the general manager and chief executive officer of a corporation, the principal business of which is the investment of its funds in mortgages and other securities, may bring a writ of entry in the name of the corporation to foreclose a mortgage owned by it. 619 note 1.

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1. An electric street railway is a legitimate and ordinary use of the street within the meaning of a statute granting to a telephone company the right to use the streets with its lines of poles and wires, but so as not to obstruct the ordinary use thereof. 549.

2. An electric railway company was authorized to occupy a street upon which a telephone line had been previously constructed under authority of law, with a proviso that it should not obstruct the ordinary use of the street. Held, that each must exercise its rights with that careful and prudent regard for the rights of the other which the law enjoins, and which is embodied in the maxim, *sic utere tuo ut alienum non laedas*. 549.

3. Where the poles and wires of an electric railway company were erected on both sides of a street and so as to interfere with the poles and wires of a telephone company previously erected on one side of the same street, the railway company is liable for the injury caused by such interference, and a recovery for the expense incurred in repairing such injury was allowed. 549.

4. A telephone company whose line is in operation is not bound to protect

itself from the probable injurious consequences to it, from the building of an electric railway, by making such changes in its existing plant as will obviate the effects of conduction. 549.

5. The lawful, harmless and accustomed use upon one's own land of electricity cannot be lawfully obstructed or impaired by the injurious act of another, in generating and permitting the escape of electricity, of unusual or unnatural power or volume, so as to disturb the usual and natural electrical conditions upon neighboring property and thereby cause injury and loss to others. 549.

6. An electric railway company is not liable to a telephone company, whose lines were previously constructed on the same street, but whose rights are subject to the ordinary uses of the street, for injuries caused by induction. 549.

7. An electric street railway is liable to a telephone company for injuries caused by conduction, or the escape of electricity into the earth adjacent to its lines, and the telephone company may recover the cost of putting in a metallic return circuit, that being the cheapest and simplest remedy for the evil. 549.

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1. A city has no right to erect a standpipe in a public street, even though the fee of the street is in the city, since such use of the street is inconsistent with the objects for which streets are established. 62.

2. When an abutting owner is specially damaged by a standpipe in a street, the fee of which is in the public, as by obstructing light to his building, he may recover damages therefor. 62.

3. Injury to abutting property by a change of grade made necessary by the construction of a railroad across the street 150 feet from plaintiff's property does not impose any liability therefor upon the railroad company. 62 note 4.

4. Where a railroad was constructed across a street upon which plaintiff's property abutted, at a distance of several hundred feet therefrom, and permanently obstructed the street, the plaintiff may recover damages therefor. 38 note 7.

5. The erection of a line of telegraph in a rural highway, the fee of which is in the abutting owners, is not a new method of exercising the old public easement, but a permanent and exclusive use and possession of a part of the way for a totally distinct and different kind of use from that of the legitimate public easement of a highway, which cannot be made without compensation to the owner of the fee. 69.

6. Where a line of telegraph poles and wires is erected in a rural highway, the fee of which is in the abutting owners, such owners may maintain ejectment to recover the land so occupied, subject to the public easement therein for a highway. 69.

7. A telegraph or telephone line in a street is not an additional burden upon the fee. 76 note.

8. A telegraph company authorized to construct its line in a highway has no right to occupy the soil of the abutter or injure his trees or property without compensation. 687.

9. The injury to a telephone by conduction, caused by an electric railway, constitutes such an invasion of the company's property as amounts to a taking for public use, and renders the railway company liable for the damage thereby inflicted. 549.

10. The interference with access and other injury to abutting property, by a causeway in the middle of the street, fifteen feet wide and from nothing to nine feet high, forming an approach to a railroad bridge, the fee of the street being in the public, does not

constitute a taking of the abutting owner's property. 39.

11. Whether injury to abutting property by a change of grade, or the construction of embankments, causeways and the like, for the accommodation of, or in connection with, the laying of a railroad in the street amounts to a taking. 56 note.

12. Approach to toll bridge occupying middle of street, whether a legitimate street use, and whether damage to abutting property thereby is a taking. 57 note 2.

Extending streets over railroad tracks and yards.

13. Under the general law permitting cities to establish streets, they have implied power to extend streets across the right of way of a railroad, where both uses may co-exist, without material injury to the railroad right of way. But when the railroad use will be materially impaired or destroyed, the opening of the highway will be denied. 17.

14. A street cannot be extended through the yards, and across the tracks of a railroad company, where to do so would require the destruction and removal of a turntable, water tank, engine house and coal dock, though such structures might be rebuilt and conveniently used on other land of the railroad in the vicinity. 17.

15. Right to lay out street across railroad tracks or through railroad yards, grounds or buildings. 22 note 1.

16. Measure and elements of damages when a street is laid out across railway tracks and grounds. 24 note 2.

17. The measure of compensation for railroad land taken by a city for a street is the decrease in its value for railroad use, caused by its use as a street, without reference to such expenditures as the railroad company may be obliged to make in complying with the police regulations of the city in regard to street crossings. 24 note 2.

18. The fact that the railroad company owns the land in fee makes no difference in the measure of compensation, since a railroad company has no right to use any land for other than railroad purposes. 24 note 2.

19. Where a street is laid out across tracks used for storing cars, the railroad company may recover such damages as it will sustain by being de-

prived of such use of the tracks within the limits of the street. 24 note 2.

The question of benefits.

20. Where a part of a lot or tract of land is taken for an elevated railroad, the remainder is not damaged within the meaning of the law unless its value is diminished by reason of the taking, and the amount of compensation is measured by the diminution in value occasioned by the construction and operation of the road. 1.

21. Special benefits are such as are not shared in by the community at large; if property is enhanced in value by reason of a railroad or other improvement, it is specially benefited, although property generally along the line, or in the vicinity, of the improvement may be similarly affected. 1.

22. Every element arising from the construction and operation of a railroad or other public improvement, which, in an appreciable degree, is capable of ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particular property, is properly to be taken into consideration in determining whether there has been damage and the extent of it. 1.

23. Consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of a proposed railroad or other public work, and the effect of which can be no other than conjectural or speculative, should be excluded. 1.

24. What benefits to the part not taken may be considered in estimating the compensation required to be made. 16 note.

ENGROSSING.

Engrossing, forestalling and regrating, whether illegal in United States. 190 note 2.

EVIDENCE.

1. It is error to admit the opinion of an expert as to whether it was a defect in a freight car that there was nothing on the end of it for a brakeman, after uncoupling for a flying switch, to lay hold of. 264.

2. While a railroad may prove not only written but oral instructions given to its assistant inspectors, its

inspector cannot give his opinion as to what the duties of the assistants were under the instructions given by him to them. 264.

FELLOW-SERVANTS.

1. A common laborer employed by a railroad, and working, under direction of a section foreman, on a culvert thereon, is a fellow-servant with the engineer and conductor of a passenger train, in such sense as exempts the company from liability for an injury to him due solely to the negligence of such conductor and engineer in operating the train, whereby he was struck by the locomotive. 302.

2. Such employees are engaged "in the same general business," within the Compiled Laws of Dakota territory, exempting the employer from liability for losses suffered by his employee in consequence of negligence of another employed in the same general business. 302.

3. The plaintiff was a sectionman, and was injured by a piece of coal, which fell from a passing train. It was the duty of the fireman on the train to place in safety any coal left in a dangerous position by the loading of the tender; held, that the plaintiff and the fireman were not fellow-servants in such sense as to preclude recovery. 309 note.

4. The engineer and conductor of a work train are fellow-servants with a laborer thereon, where it is in charge of a roadmaster, who directs its movements, and has control of all persons employed upon it. 314 note 10.

5. A railroad employee who is one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the negligence of the wreckmaster, who has charge of the wrecking car. 314 note 10.

6. The engineer and fireman of a locomotive and a common laborer, all of whom are engaged in moving cars from a spur track, are fellow-servants, and the latter cannot recover from the master for the former's negligence. 314 note 10.

7. A member of one "section gang" and the "boss" of another "section gang," employed by the same railroad company, are fellow-servants. 314 note 10.

8. Railroad sectionmen and laborers on repair trains, employed by the same master for the same general purpose of keeping the roadbed and track in order, and working for the same general result, are fellow-servants. 314 note 10.

9. One whose duty it is to take the number and description of each car in trains coming to a certain station and an engineer operating a switch engine at the same station are fellow-servants. 314 note 10.

10. The question of who are fellow-servants among railroad employees — general principles. 309 note.

11. Member of train crew and persons employed on or about the track. 312 note 2.

12. Foreman and laborer under him. 312 note 3.

13. Conductor of one train and employees on another train. 313 note 4.

14. Track repairers and switchman working in same yard. 313 note 4.

15. Trainmen of construction train and laborers employed and working in connection with such train. 313 note 6.

16. Men engaged in making up train and brakemen afterwards engaged in operating the train. 213 note 7.

17. Train hand and train dispatcher. 313 note 8.

18. Conductor and brakeman of same train. 314 note 9.

FOREIGN CORPORATIONS.

1. It is not against the laws or policy of a state for citizens to form a corporation under the laws of another state to do business in the state of their citizenship. 184.

2. Act of Michigan, requiring all foreign corporations thereafter permitted to do business in the state, to pay a franchise fee, and declaring all contracts made by them before complying with the act to be void, does not apply to foreign corporations selling goods in the state through itinerant agents, since, if so applied, it would be a restraint upon interstate commerce and void. 620.

3. The sale of brick in another state, to be delivered in Alabama, is an act of interstate commerce, which is not affected by laws of Alabama requiring

foreign corporations to have a place of business and an agent in the state as a condition precedent to doing business therein. 621 note 1.

4. Validity of contracts made before complying with state laws as to doing business. 622 note 2.

5. Where an application and premium note are taken in Massachusetts by the agent of an Iowa insurance company, and by him sent to the home office, in Iowa, where they are accepted and the policy is executed, said policy being delivered in Massachusetts, the business of effecting the insurance is done in Massachusetts. 622 note 3.

6. The institution and prosecution of suits in the courts of Alabama by a foreign corporation is not an act of business therein, and may be done without having a place of business and an agent in the state. 622 note 8.

7. A person contracting with a foreign corporation before it has complied with the statutory requisites is estopped to deny the authority of the corporation to make the contract, and its capacity to sue thereon. 622 note 4.

8. Right to make contract cannot be questioned after contract is fully executed. 622 note 5.

9. The Constitution of Missouri, that "no religious corporation can be established in this state, except such as may be created under a general law, for the purpose only of holding title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries," does not prohibit a foreign religious corporation from holding land in Missouri for the purposes specified. 623 note 6.

10. The question whether a foreign religious corporation has attempted to acquire more land than it is allowed to hold is one which can be determined only in a direct proceeding by the state. 623 note 7.

11. State insolvent laws held not to apply to foreign corporations. 623 note 8.

12. Service of process and jurisdiction over foreign corporations. 624 note 10.

FORFEITURE.

See CORPORATIONS, 3-6.

INJUNCTION.

See STRIKES AND BOYCOTTS.

1. Of the remedy by injunction when the abutting owner's easements in the street are interfered with so as to amount to a taking. 61 note 8.

2. Right of telephone or telegraph company to an injunction against an electric railway company to prevent electrical interference. 577 note.

3. Where the answer to a bill to enjoin the erection of a bridge across a public alley admits an intention to erect the bridge, and describes it specifically, and it appears that defendants have no right to erect any bridge in such alley, it is proper to enjoin them from erecting any bridge across the alley, without limiting the injunction to the particular kind of bridge proposed to be erected. 707.

4. An injunction will not lie to prevent the construction of a causeway in the middle of a street by a railroad company under due authority, the fee of the street being in the public, but the abutting owner will be left to his remedy at law. 89.

INSURANCE.

1. An act prohibiting the doing of an insurance business except by corporations is not in violation of the Federal Constitution. 519.

2. Such statute does not conflict with the bill of rights of Pennsylvania, which declares that all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of acquiring, possessing and protecting property and reputation. 519

3. The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners and the nature of the business, a proper subject for the exercise of the police power of the state. 519.

4. An act providing that any person in any manner securing, helping or aiding in placing any insurance with any foreign insurance company, not authorized to do business in the state, shall be guilty of a misdemeanor, does not prevent an owner insuring his property in such foreign company. 623 note 9.

INTERSTATE COMMERCE.

See CHARGES, REGULATION OF, 3; TRUSTS, COMBINES AND MONOPOLIES, 6-8.

1. That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. 737.

2. Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated by congress, because they form part of interstate trade or commerce, and over these the power of congress is exclusive. 737.

3. The power of the state to protect the lives, health and property of its citizens, and to preserve good order and the public morals, including the power to relieve the citizens of the state from the burden of monopoly and the evils resulting from the restraint of trade among its citizens, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. 737.

INTERSTATE COMMERCE LAW.

1. The provision of section 12 of the Interstate Commerce Act authorizing Circuit Courts, on the refusal of any person to obey a subpoena issued by the interstate commerce commission, to order such person to appear before the commission and give evidence, failure to obey such order to be punishable by the court as a contempt thereof, is not unconstitutional, as imposing on the courts functions not judicial in their nature. 469.

2. Such provision is not in derogation of the fundamental guaranties of personal rights recognized by the Constitution as interfering with the freedom of the citizen, for the witness may avail himself of their protection in the proceeding to compel his attendance. 469.

8. The provision is not invalid because a trial by jury is not accorded, for the issue is one of law, and, in matters of contempt, a jury is not required by due process of law. 469.

MAILS.

See STRIKES AND BOYCOTTS, 18-21.

MANDAMUS.

See STOCK AND STOCKHOLDERS, 11, 12.

MISNOMER.

See CORPORATIONS, 7-20.

MOBS, INJURIES BY.

See MUNICIPAL CORPORATIONS.

MONOPOLIES.

See TRUSTS AND COMBINES.

MUNICIPAL CORPORATIONS.

See EMINENT DOMAIN.

Control of streets—granting use for private purposes.

1. An ordinance granting to private parties the right to construct for their own use a bridge over a public alley is invalid, since cities hold the fee of the streets in trust for public uses only. 707.

2. Where a proposed obstruction in a public alley inflicts special damage on the owner of an adjoining lot, he is entitled to an injunction restraining its erection. 707.

3. Power of municipal corporation to grant use of street for private purposes—awnings. 718 note.

4. Granting right to place private scales in street. 720 note 2.

5. Uses of streets beneath the surface in connection with abutting property—license to construct vault under public alley, when irrevocable. 720 note 5.

Defective sidewalks—accident cases.

6. Whether one injured while walking on a sidewalk at night, with knowledge that it is defective, and

looking for the defect at the time, is guilty of contributory negligence, is a question for the jury. 698.

7. In an action for personal injuries caused by a defective sidewalk, contributory negligence of the plaintiff will not be presumed from his knowledge of the existence of the defect, nor will his use of the sidewalk under such circumstances preclude his recovery. 705 note.

8. It is not necessary that the thoughts of a traveler should at all times be fixed upon a defect in a public thoroughfare, of which he may have had notice. 706 note.

9. If a person, with full and present knowledge of the defective condition of a sidewalk, voluntarily attempts to travel upon it, when the defect could easily have been avoided by going around it, he is not in the exercise of reasonable care, but must be presumed to have taken his chances, and if injury results he cannot recover from the city. 706 note.

10. Where a person knew that a bridge was in a dangerous and unsafe condition, and yet undertook to drive over it without apparent necessity, it was held that he was guilty of contributory negligence and could not recover. 706 note.

Liability for injuries or damages done by mobs—statutes.

11. In the absence of a statute giving a remedy, a city is not liable for damages for the taking of human life by a mob, although its officers may have been negligent in preserving the public peace. 721.

12. The Civil Code of Louisiana, declaring that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," which, by subsequent amendments, is made applicable to cases of death through negligence, gives no remedy against a municipal corporation for negligence in preserving the public peace, resulting in loss of life by acts of a mob. 721.

13. Municipalities not liable at common law for property damaged or destroyed by mobs. 735 note 1.

14. Construction and application of statutes imposing a liability upon municipalities in case of the destruction of life or property by mobs. 735 note 2.

15. It is within the constitutional power of the legislature to impose such liability upon municipal corporations. 736 note.

16. The plaintiff has no constitutional right to a jury trial upon the amount of damage, but the legislature may provide for an appraisalment by six persons appointed by a court. 736 note.

17. The remedy may be given or taken away at the pleasure of the legislature, and even when the claim has been reduced to judgment the plaintiff has no vested right to the damages awarded. 736 note.

18. It is no defense to an action under such a statute that the property destroyed was a public nuisance, such as a fish-oil factory or a bawdy house and a resort for thieves, robbers and murderers. 736 note.

Liability for negligence in the discharge of public duties.

19. A city is not liable to one employed by it as a lineman on its fire-signal system, who is injured by the breaking of a pole to which the wires of the system were attached, though the breaking was due to the negligence of the city. 680.

20. Liability for negligence of fire department. 682 note 1.

21. A city is not liable for the negligence of a fireman engaged in the line of his duty, nor for injuries resulting from defects in the apparatus for extinguishing fires. 682 note 1.

22. A town is not responsible for an unlawful arrest by the town marshal, since in making arrests he is acting for the public, and is not the agent of the town. 682 note 2.

23. Liability for wrongful closing of circus by mayor and police. 682 note 3.

24. Liability for negligence in erecting a market house. 682 note 4.

25. Liability of county for neglect in care of jail. 682 note 5.

Miscellaneous.

26. A city is not liable for injuries caused by a discharge of fireworks because the city authorities suspended, for the day of the accident, an ordinance forbidding the discharge of fireworks. 675.

27. The grant of authority by a city to construct a railroad in a street does

not render it liable for damages to abutting property occasioned by such railroad. 38 note 6.

NAME.

See CORPORATIONS, 7-35.

NEGLIGENCE.

See FELLOW-SERVANTS; MUNICIPAL CORPORATIONS, 6-25; RAILROADS; STREET RAILROADS.

PASSENGERS.

See CARRIERS.

PENAL STATUTES.

See STATUTES.

POLICE POWER.

See CARRIERS, 10-27; INTERSTATE COMMERCE; STREET RAILROADS, 1, 2.

POOLING CONTRACTS.

See RAILROADS, 30-33.

PRACTICE.

See CORPORATIONS, 14-21.

1. Where, at the close of plaintiff's evidence, defendant moves to dismiss, which is denied, and defendant thereupon proceeds to introduce evidence, any exception to the action of the court is waived. 315.

2. Practice in regard to withdrawing cases from the jury and directing a verdict in negligence cases. 321 note.

3. An instruction that "no sane man would lose a leg for any compensation, but you are not to be guided by such a consideration as that in arriving at the amount of damages," is objectionable, as drawing away the mind from the legal measure of damages. 264.

4. An instruction is improperly given where there is no evidence on which to base it. 264.

5. In an action by a boy of eleven for a negligent injury to himself, it is unnecessary to allege due care on the part of his parents. 273.

PRESIDENT.

See **DIRECTORS AND OFFICERS.**

PROMOTERS.

1. Promoters occupy a fiduciary relation toward the company or corporation whose organization they seek to promote. 632.

2. A secret contract, between an owner of patents and a promoter, that the latter shall form a company to buy said patents for a certain price, the patentee to pay the promoter one-half of the price received, is void, as against public policy. 632.

3. Liability to corporation for secret profits realized from sale of land to corporation. 652 note.

4. When a promoter, having secretly agreed with a patentee to form a company to buy his patents, the patentee to pay him half of the price received, induces subscriptions by stating that he is subscribing on equal terms with the rest, and, being elected a director, votes for the resolution to buy the patents, the company may recover of him his secret profits; and it is not obliged to rescind the purchase, and so destroy its own reason for being. 632.

5. A suit against a director for his secret profits on a sale to the company is properly brought by the company, and not by its stockholders. 632.

6. Where the president of a corporation ratifies, for its benefit, a contract for services to be rendered to the corporation, made by him while acting as a promoter thereof, and such services are performed for the corporation, and the contract is one which would have bound the corporation if made by the president after it had acquired a legal existence, the corporation is bound by the contract. 611.

PUBLIC POLICY.

See **RESTRAINT OF TRADE.**

1. Public policy as a basis for judicial decisions. 84 note.

2. What is public policy — definitions. 84 note 1.

3. Public policy is a variable quantity; it changes with the habits, capacities and opportunities of the public

and with the changing conditions of the times. 85 note 2.

4. How the public policy of a state is to be ascertained. 86 note 8.

5. State and national policy distinguished. 95 note 4.

6. Public policy favors freedom of contract — the rule and its limitations. 96 note 5.

7. All contracts and undertakings contrary to public policy are void. 97 note 6.

8. The violation of public policy must be clear to justify the application of the rule. 97 note 7.

9. It is the tendency of the act or contract to injure the public which determines its validity, and not the fact of injury. 97 note 8.

10. Whether a contract is opposed to public policy is a question of law for the court and not of fact for the jury. 98 note 9.

11. The objection that a contract is contrary to public policy may be taken at any stage of the proceedings, and by the court of its own motion. 98 note 10.

12. A contract by which plaintiff agreed to refrain from forming a corporation for the construction of water works in a certain city, and from carrying on or prosecuting such work, in order that defendant might incorporate for that purpose, and conduct the business without competition, is not void, as against public policy. 611.

RAILROAD COMPANIES.

See **CARRIERS; EMINENT DOMAIN; FELLOW-SERVANTS; RECEIVERS; STRIKES AND BOYCOTTS; TAXATION.**

Accidents at crossings.

1. It is negligence for a railway company to occupy a street crossing with a train for fifteen minutes, to the exclusion of public travel, and then, after the engineer has left his post, to start the train without warning persons who have been waiting in the rain for a chance to cross. 273.

2. Where a boy eleven years old has been standing in the rain fifteen minutes while a train was switched back and forth across a street, finally coming to a stop with a coupling directly opposite where he stood, it is not negligence for him to pass between the coupled cars, he having seen the engi-

neer leave his engine, and being directed to pass through such opening by the flagman in charge of the crossing. 278.

8. Liability for injury to persons while climbing between cars which obstruct a crossing. 279 note.

Injury to trespassers.

4. Where a railroad company allows two passenger cars to remain on a side track near its depot and along a public street, the doors of the cars being open, and where it appears that children of all ages were in the habit of going about the depot and adjacent grounds for amusement, and that this practice was known to the defendant's servants, it is negligence to back other cars against those so left standing, for the purpose of coupling, without seeking to ascertain whether there are any persons in the cars. 280.

5. Although plaintiff is technically a trespasser, yet, where an injury is the result of nonperformance or violation of a plain and manifest duty for protection of human life or safety, the party thus acting will not be heard to say, in justification, that the person thus injured was merely a trespasser. 280.

6. The plaintiff, a boy of eleven, had climbed upon a coal car standing upon a side track at a depot and was knocked off and injured by other cars being backed against it. The company's servants did not know of his presence upon the car and had taken no precautions to ascertain whether anybody was on the car or not. Held, that the defendant was not liable. 287 note.

7. A railway company is not ordinarily obliged to keep a lookout for trespassers, whether adults or children, on its cars or track, nor to presume that they will expose themselves to danger thereon, but, having notice of their presence, and that they are in danger, its servants controlling the movements of its cars or machinery are bound to use reasonable care to avert it. 287 note.

8. A child of twelve climbed on the ladder of a freight car and was killed by coming in contact with a pile of lumber. There was evidence tending to show that a brakeman on the train was aware of her position or intention to board the train. Held, that the

questions of negligence and contributory negligence were for the jury. 287 note.

9. Liability for injuries to children trespassing upon the cars, yards or track. 287 note 1.

10. Liability for injuries to children playing about turntables. 289 note 2.

11. Liability for injury to trespassers upon train. 289 note 3.

12. Liability for injury to trespassers on track. 290 note 4.

13. Effect of license, express or implied, to use track. 292 note 5.

Injuries to employees.

14. It is the duty of a railroad company to its employees to exercise reasonable care in furnishing suitable cars, machinery and appliances for use in the business in which they are engaged, and in keeping the same in repair, including the duty of making inspections, tests and examinations at the proper intervals. 315.

15. This duty is not discharged by simply using reasonable care to employ and retain only competent and diligent inspectors, but if its inspectors in fact fail to discover a defect which a reasonable examination would have disclosed, and an employee is injured in consequence thereof, it will be liable. 315.

16. It is the duty of a railroad company to exercise reasonable care in furnishing its servants with safe machinery and implements for the transaction of its business; but it is not bound to furnish the best and safest appliances, nor the latest improvements. 264.

17. It is the duty of a railroad company to its brakeman to take ordinary care that the ends of freight cars be furnished with such handles, ladders or safeguards as are in common ordinary use on railroads. 264.

18. The Constitution of Pennsylvania, directing railroads to receive and transport cars of a connecting road without delay or discrimination, does not oblige it to move such cars when not provided with the appliances which ordinary care requires for the safety of the crew, and, therefore, does not relieve them from liability to their employees in negligently doing so. 264.

19. It is not contributory negligence for a brakeman to make a flying

switch, where it is required by the nature of his employment. 264.

20. Where a brakeman had not previously been on a car which he was to side track by a flying switch, and claimed that he did not know that it was unprovided with handles to grasp after uncoupling it, his duty having compelled him to act at once, without opportunity for inspection, the question of his contributory negligence is for the jury. 264.

21. Duty and liability with respect to foreign cars received for transportation. 272 note.

Injuries resulting from a failure to fence.

22. A statute requiring railroad companies to fence their tracks, though in terms only imposing as a penalty a double liability for injuries to live stock, renders a railroad company liable for the death of an engineer, caused by a collision of his engine with a bull that had come on the track through a defect in the fence. 323.

23. In such case the defective fence is the proximate cause of the injury, though the train was going at a greater rate of speed than that allowed by the rules of the company. 323.

24. The effect of a collision was to throw off the front wheels of the engine only, and it ran in this condition for about 1,000 feet, when, coming to a switch, it was overturned and the engineer killed; held, that the engineer was not guilty of contributory negligence in remaining on the engine. 323.

25. Whether statutory duty to fence track inures to benefit of passengers and employees on train or to children and others injured in consequence of a neglect of the duty. 331 note.

26. When fences are reasonably necessary to protect the track from the intrusion of animals, the duty of the company to its passengers and employees requires it to construct and maintain such fences. 332 note 2.

Injury to volunteer—who are volunteers.

27. The plaintiff, a switchman, while off duty, was riding on the defendant's train and was ordered by the conductor to turn a switch, which he did; held, that the conductor had no implied authority to give such command,

and that the act of obeying it did not constitute the plaintiff an employee of the defendant. 301.

28. One who has no interest in the work to be performed, who voluntarily assists the servants of a railroad company, either with or without their request, does so at his own risk, and the company is not liable for any injury to such person by reason of the negligence of such servants. 293.

29. One who has an interest in the work to be performed, either as consignee or servant of a consignee, or in any other capacity, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. 293.

30. Nor could the person injured be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground. 293.

State control—compelling the removal of grade crossings.

31. The legislature may authorize a city to compel a railway company which has laid its tracks across a street, to bridge the tracks at its own expense and according to plans prepared by the city, provided a reasonable necessity therefor is shown to exist. 371.

32. Facts held to show a reasonable necessity therefor. 371.

33. In order to compel railroad companies to bridge a street over their tracks, it is not necessary that the part of the street bridged should be abandoned to the use of the companies when by so doing extended territory would be rendered inaccessible. 371.

34. Power of state to compel railroad companies to remove grade crossings at their own expense. 378 note.

Pooling contracts—validity.

35. An agreement between railroad companies, by the terms of which all their roads are to be operated, as to through traffic, as if "operated by one corporation which owned all of them," and which provides for a division of traffic or gross earnings, is contrary to public policy, and void. 173.

36. One party to such illegal agreement, claiming to have performed its

part thereof, cannot maintain a suit to enforce division of earnings by another party thereto, the traffic not having been divided. 173.

37. Agreements, combinations and pools between common carriers for the purpose of controlling rates and preventing competition. 181 note.

RAILROADS IN STREET.

See MUNICIPAL CORPORATIONS, 27.

1. No reason exists for a distinction between railroads designed exclusively for passenger traffic and railroads designed to carry both freight and passengers, as respects the burden thereby imposed upon the street. The difference, if any, is of degree and not of kind. 25.

2. Where a railroad is laid in a public street without authority, ejectment will lie by the owner of the fee, but if the road is laid under legislative authority, ejectment will not lie. 25.

3. In an action of ejectment by the owner of the fee of a street, against a railroad laid therein, no question of damages to abutting property arises. 25.

4. Where a railroad is laid in a public street without authority, the owner of the fee should be remitted to an action to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be. 25.

5. The fee simple of land used as a public highway belongs to the abutting owners, subject to the public right of way, and the possession thereof may be recovered in ejectment by the owner against a railroad company appropriating the same to its permanent use without legislative grant. 38 note 4.

6. Mere acquiescence in the construction and operation of a railroad in a public highway will not prevent the abutting owner from recovering possession of the highway as against the railroad company. 38 note 4.

7. An electric street railway, operated by the trolley system, and for the transportation of passengers only, whose tracks conform to the surface of the street, is not an additional servitude upon the fee of the street. 549.

8. A street railway is not an additional servitude. 38 note 3.

9. Effect of narrowness of street upon its use by a railroad. 36 note 2.

10. A city cannot authorize the construction and operation of a railroad through a street so narrow that such use will necessarily destroy it as a public thoroughfare, and deprive abutting owners of reasonable access to their property. 36 note 2.

11. Authority to lay tracks in street does not authorize its use as a switch yard. 38 note 5.

12. A causeway in the middle of a street, forming the approach to a railroad bridge, having been built under legislative authority, is not a nuisance. 39.

13. Under Civil Code of California, where a city grants authority to a railroad company to occupy a street, it is not revocable at the mere pleasure of the board, but there must be failure on part of the road to comply with the terms of the grant before the privilege can be recalled. 39 note 8.

RECEIVERS.

1. A receiver of a corporation, appointed in a proceeding by judgment creditors after a return of nulla bona on their executions, acquires all the rights of the creditors; and in an action by him for unpaid stock subscriptions the stockholders cannot set up a defense which, though good in an action by the corporation, could not be set up in an action by the creditors individually. 604.

2. Supervision by court of wages and terms of employment, when railroad in hands of receiver — principles and practice. 446 note 10; 447 note 11.

3. Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court. 446 note 9.

RESTRAINTS OF TRADE.

General principles — test of validity.

1. Early doctrine — all restraints of trade void — reasons for the rule. 108 note 2.

2. Later doctrine — all general restraints void — partial restraints valid if reasonable. 109 note 8.

3. Modern doctrines — tendency to ignore the distinction between general and partial restraints — English cases. 110 note 4.

4. Modern doctrines — tendency to ignore the distinction between general and partial restraints — American cases. 116 note 5.

5. Restraints of trade not void merely because the restraint is unlimited in space or coextensive with the territory of the state or nation. 127 note 6.

6. Further as to general and partial restraints — restraints unlimited in space but limited as to the persons with whom or modes in which the business may be carried on — no hard and fast rule in the matter. 121 note 7.

7. Grounds upon which contracts in restraint of trade have been held void — public policy infringed by reason of injury to the individual and injury to trade. 135 note 8.

8. Contracts in restraint of trade are void, as being against public policy, unless founded upon a valuable consideration, and limited, as regards time, space and the extent of the trade, to what is reasonable under the circumstances of the case, for the reason that they tend to deprive the public of the services of the parties in the employments and capacities in which they are most useful, and that they tend to expose the public to the evils of monopoly. 99.

9. The test of validity is the reasonableness of the restraint. 136 note 9.

10. The test as to whether the restraint is reasonable or not is, whether the restraint is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. 99.

11. The reasonableness of the restraint is to be considered in two aspects: First, as respects the parties, and, second, as respects the public. 139 note 10.

12. When the restraint is reasonable and when unreasonable as respects the parties. 141 note 11.

13. When the restraint is reasonable and when unreasonable as respects the public. 142 note 12.

Validity of particular restraints.

14. Upon the sale of a business to be continued by the vendee, the public is not injured by a restraint of the vendor, which is reasonable. 142 note 18.

15. A stipulation by a manufacturer of fire alarm and telegraph apparatus, on a sale of all his machinery, stock, letters patent and inventions, that he will not for ten years engage in the manufacture and sale of such apparatus, or enter into competition with the purchaser, either directly or indirectly, while valid in so far as the patents and inventions agreed to be sold are concerned, is void, as a general restraint of trade, in so far as it prohibits the seller from engaging in the manufacture and sale of such apparatus under other patents, or under no patents at all. 78.

16. It is not an unreasonable restriction on trade for persons, forming a corporation under which they shall unite their business of manufacturing oleomargarine, to agree that none of them shall separately engage in the business for five years, without any limitation as to territory, they having in contemplation an extensive business, which should include the building up of a foreign trade. 184.

17. Whether the restraint may not only be coextensive with the trade or business as it exists when sold, but may cover any contemplated or probable expansion thereof. 143 note 14.

18. The same rule applies to the sale of a professional business as to any other. 145 note 15.

19. So when a partner sells out his interest in the business to his associates. 145 note 16.

20. So where one is taken into a partnership and covenants not to enter into the same business in the same territory in case of his retirement from the firm. 145 note 17.

21. So where one having a controlling interest in a corporation, and engaged in prosecuting its business, sells his stock and retires from the business. 146 note 17.

22. Where a person enters into the employ of another, an agreement that he will not, after the termination of the employment, engage in the same business in any way or manner in the same place or territory is not injurious to the public. 147 note 19.

23. Validity of contracts by which one agrees to buy of another exclusively, or to sell to another exclusively, or to deal exclusively in a certain make or description of goods. 148 note 20.

24. Validity of contracts by which one agrees to serve another exclusively or to employ another exclusively. 149 note 21.

25. Upon a sale or lease of property for the carrying on of a particular business, the vendor may stipulate not to engage in the same business in competition with the vendee or lessee. 150 note 22.

26. Cases in which a business is bought, not to be continued as an independent business, but to be consolidated or merged in a similar business already carried on by the purchaser, and the vendor is restrained from engaging in the same business in the same territory. 150 note 23.

27. Buying off competition—restraints entered into for the benefit of the covenantee but not accompanied by any sale of property or business. 153 note 24.

28. Division of territory, business or customers among competitors, each agreeing to confine his operations to a particular district or class of business or customers. 155 note 25.

29. Validity of restraint as affected by the nature of the business restrained—the liquor traffic. 157 note 27.

30. A covenant or condition in a deed that liquor shall not be sold on the premises is valid. 159 note 30.

31. So of a covenant in a lease that the premises shall not be used as a coffee house. 159 note 30.

32. So of a covenant restricting the use of property conveyed to dwelling purposes. 159 note 30.

33. When the business restrained is of a public nature or affected with a public interest. 157 note 28.

34. The doctrine as to contracts in restraint of trade does not apply to sales of trade secrets and patents, or a business depending thereon. 158 note 29.

Miscellaneous questions.

35. Restraints upon the use of property. 159 note 30.

36. Restraints upon alienation. 160 note 31.

37. Agreements among stockholders restraining the right of alienating or of voting their stock. 161 note 32.

38. The grant of exclusive rights of way to telegraph companies and the like, or restraints upon alienation to similar companies. 162 note 33.

39. The grant by a railroad company to a telegraph company of the exclusive right of constructing and operating a line of telegraph along its right of way is held to be void as against public policy. 162 note 33.

40. By-laws in restraint of trade to be valid must not be repugnant to the law of the land, and must be reasonable. 163 note 34.

41. The reasonableness of a contract in restraint of trade is a question of law to be decided by the court. 99; 165 note 35.

42. As to the duration of the restraint. 165 note 36.

43. Construction of agreements in restraint of trade—divisibility. 167 note 37.

44. A covenant is always divisible in time, so that, if for any reason it is greater in duration than is reasonable, it may be enforced for such time as is reasonable, and held void as to the remainder. 168 note.

45. Whether a void restraint is also illegal. 169 note 38.

46. The consideration for the contract. 170 note 39.

47. At the present day contracts in restraint of trade stand upon the same footing as other contracts in respect of consideration. 170 note 39.

48. A pecuniary or valuable consideration alone will not support a restraint however limited. 170 note 40.

49. Whether contracts in restraint of trade are presumptively bad. 171 note 41.

50. All restraints are presumptively bad, if nothing more appears, but if the facts and circumstances are set forth or made to appear, then the court is to judge whether it is reasonable or not. 99.

51. Party relying upon contract in restraint of trade must aver facts to show it reasonable. 99.

52. If the contract is valid when made a change of circumstances does not render it invalid. 172 note 42.

53. The benefit of a covenant in restraint of trade may be assigned. 172 note 42.

STATUTES.

1. When valid and invalid provisions of statute may be separated so that former may stand. 284 syl. 4.

2. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of such statute before judgment rendered in such suit. 589.

3. A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. If its object is clearly to inflict a punishment on a party for doing what is prohibited, or failing to do what is commanded to be done, it is penal in its character. 589.

STOCK AND STOCKHOLDERS.

See CORPORATIONS, 1, 2.

Subscriptions.

1. Where subscribers for stock of a corporation, with knowledge that some of the stock has been subscribed for by another corporation, pay their subscriptions on some of the stock, they cannot, "as against creditors," defend an action against them for their subscriptions on other stock on the ground that, the subscription by the corporation being invalid, the whole stock was not subscribed for. 604.

2. Where a person subscribes for the stock of a corporation "as trustee," it may be shown by parol evidence that he subscribed as agent for individuals, thereby making it a "pool" subscription, so as to bind such individuals. 604.

3. Subscriptions not enforceable until requisite amount unconditionally subscribed. 611 note.

Liability of stockholders to creditors.

4. When a law commands corporations to publish annually a notice of their indebtedness, declares that all the stockholders thereof shall be liable for the debts of the corporation in case it fails to comply with the requirements of the statute, then the law is designed as punishment of the stockholders for a violation of the law, and is penal. 589.

5. The creditors of a de jure corporation have no right of action against the stockholders thereof until they have reduced their claims against

the corporation to judgment, and until execution issued upon such judgment has been returned wholly or in part unsatisfied. 589.

Restrictions upon the right to transfer stock.

6. Where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, subject to such conditions, he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void. 625.

7. Where a stockholder agrees to transfer his shares to the company at an appraisal to be made by the directors, the decision of the directors cannot be impeached by showing that they committed errors of judgment in the appraisal. 625.

8. A stockholder may be forced to specifically perform a contract to convey his stock to the corporation, according to an appraisal made by the directors. 625.

9. When certificates of stock are transferable only to the corporation at an appraisal to be made by the directors, such appraisal may be made without notice to the stockholder. 625.

10. A business corporation cannot make it a condition of transferring stock that the holder shall first have offered it to the directors, and shall have paid all his indebtedness to the corporation. 632 note 8.

Remedy for refusal to transfer.

11. When the proper officers of a private corporation organized for profit refuse to issue a certificate to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or to enforce the issue and delivery of such certificate in equity, but mandamus is not the proper remedy. 581.

12. Where a company refuses to transfer stock on its books to a purchaser, and conspires to depreciate the value thereof, mandamus will lie to compel such transfer, under statutes of Oregon. 585 note 1.

13. The transferee of corporate stock can recover only nominal damages from the corporation for refusal to enter the

transfer on its books, in the absence of evidence of special damage by such refusal. 585 note 2.

14. In an action against a corporation to recover damages for its refusal to transfer on its books certain shares of its stock, it is no defense that plaintiff acquired the same from a prior holder by means of an illegal gambling contract when there is no showing that the prior holder ever repudiated the transaction, or made any claim on the company for the stock. 585 note 8.

15. It is no defense to such a suit that the certificates of stock are held by plaintiff as collateral security for a debt which is barred by the Statute of Limitations. 585 note 8.

Liability of stockholders as partners.

16. Where persons attempt, in good faith, to incorporate themselves into a valid corporation, and such a corporation actually enters upon the discharge of corporate functions, persons who contract with such corporation cannot hold the stockholders thereof liable on such contract because by some mistake or oversight, the corporation has never become a technical de jure corporation. 589.

STREETS AND HIGHWAYS.

See ABUTTING OWNERS; EMINENT DOMAIN; MUNICIPAL CORPORATIONS, 1-5; RAILROADS IN STREETS.

1. There is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and in the extent of the servitude in the land upon which they are located. 25.

2. When land is acquired for a street in a city, it is subject to all the uses and purposes of the public as a street, including the construction of sewers and drains, the laying of gas and water pipes, the erection of telegraph and telephone wires, and including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and such uses must be deemed to have been in contemplation when the street was opened, whether by dedication, purchase or condemnation, and hence

such uses impose no new burden or servitude upon the soil or abutting land. 25.

3. The primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move, and the intelligence be transmitted by some moving body, which must pass along the highway, either on, or over or perhaps under it. 69.

4. The primary and fundamental idea of the highway is that it is a place for uninterrupted passage by men, animals or vehicles, and a place by which to afford light, air and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. 69.

5. A street, though the fee is in the public, cannot be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter may be. 69.

STREET RAILROADS.

See ELECTRICITY.

1. An act which requires the forward end of electric cars to be provided with a screen of glass or other material that will protect the motorman from wind and storm, is not in conflict with the Constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state." Neither is it in conflict with the fourteenth amendment to the Constitution of the United States. 771.

2. Validity of legislation requiring cars to be so constructed and equipped as to protect the motorman from the weather. 777 note.

3. Employees on a street car have a right to assume that a passenger, in alighting from the car in broad daylight, will notice an excavation in the street, caused by the removal of paving blocks, and the company is not chargeable with negligence because they stopped the car near the excavation, or because they failed to caution the passenger as to the condition of the street. 777.

4. Liability for injury to passenger by stepping into hole in street while alighting from a moving car. 780 note.

5. Liability for injury caused by starting car while passenger in act of alighting. 780 note 2.

6. It is the duty of a street railroad company to safely carry and deliver a passenger, and in doing so not only to provide safe and convenient means of entering and leaving the car, but to stop when the passenger is about to alight, and not to start the car until he has alighted. 780 note 2.

7. Where plaintiff was injured by being thrown from defendant's street car by a sudden jerk of the car while preparing to get off, after having given the conductor a signal to stop, the question of plaintiff's contributory negligence is for the jury. 780 note 2.

8. Injury to plaintiff, alighting from car, by car passing in opposite direction, contributory negligence. 781 note 3.

9. A passenger on a street car, who steps from the car into a public street, ceases to be a passenger the moment he leaves the car. 781 note 4.

STRIKES AND BOYCOTTS.

1. The right of an employee, engaged to perform personal service, to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. 416.

2. The same rules and principles apply to employees of railroad companies and other quasi public corporations as to employees in other lines of service and there is nothing in the peculiar character of railroad service to justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or require employees, against their will, to remain in the personal service of their employer. 416.

3. The employees of a railroad company or of the receivers thereof may, as the result of friendly argument, persuasion or conference among themselves, peaceably co-operate or agree together to quit the service in a body and without notice, and such combination or action would not be illegal or criminal although they may have so acted in the firm belief that such

quitting would temporarily inconvenience their employers and the public. 416.

4. An order restraining such employees "from combining and conspiring to quit, with or without any notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad," is proper as referring to combinations and conspiracies having the object and intent of crippling the property in the possession of the receivers by means of physical violence or interference, or of actually preventing the regular operation of the road. 416.

5. Where a railroad is in the hands of receivers, any combination or conspiracy upon the part of their employees would be illegal which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling engines, cars or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents, or against employees remaining in their service, or by using like methods to cause employees to quit, or prevent or deter others from entering the service in place of those leaving it, and such acts and combinations may be prevented by injunction. 416.

6. The act of congress of June 29, 1886, legalizing the incorporation of national trade unions, does not sanction such illegal combinations as are above referred to, and is not pertinent to the questions arising therefrom. 416.

7. In the absence of evidence, it cannot be held, as a matter of law, that a combination among employees, having for its object their orderly withdrawal in large numbers, or in a body, from the service of their employers, on account simply of a reduction in their wages is not a "strike," within the meaning of that word as commonly used. Such a withdrawal, although amounting to a strike, is not illegal or criminal. 416.

8. Where the members of a labor organization combine and confederate

for the purpose of enforcing their demands by the seizure of the property of a railroad company by which they are employed or to prevent other men, by force and intimidation, from entering such employment, they are guilty of a criminal conspiracy and, where such acts violate an injunction, they will be punished for contempt of court. 442 note 1.

9. A corrupt or wrongful agreement between two or more persons that the employees of railroads carrying the mails and conducting interstate commerce should quit, and that all others should, by threats or violence, be prevented from taking their places, constitutes a criminal conspiracy to hinder or obstruct the mails and interstate commerce. 442 note 1.

10. A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, and, on their refusal, to inflict pecuniary injury on them by inciting their employees to quit their service, and thus paralyze their business, the existence of the contracts being known to the parties so combining, is an unlawful conspiracy. 444 note 5.

11. Combinations of employees to interfere with the operation of railroads or steamboats engaged in interstate commerce are in violation of the Federal Anti-Trust Act of July 2, 1890. 443 note 2.

12. A bill will lie on behalf of the United States to restrain such combinations and acts in pursuance thereof. 443 note 2.

Remedy by injunction.

13. A court of equity will not, by injunction, prevent one individual from quitting the personal service of another. 416.

14. An order restraining the employees of the receivers of a railroad, the organization to which such employees belong, their officers and committees, from combining to cause a strike of such employees, or from ordering, recommending, advising or approving such a strike is too broad, and should be modified by indicating that the strikes intended to be restrained were such as were designed to physically injure or interfere with the trust property, or obstruct the operation of

the road, or prevent, by unlawful means, the employment of other men. 416.

15. An order restraining the employees of railroad receivers "from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad," is erroneous, and should be rescinded on motion. 416.

16. Mandatory injunction to compel railroad employees to handle trains with Pullman cars attached so long as they remain in the service. 445 note 6.

17. Injunction to prevent an unlawful interference with railroads by strikers and others. 443 note 4; 444 note 5.

Interference with United States mails.

18. Duty of railroad company as to carrying mails in case of strikes and boycotts on the road. 446 note 8.

19. Combinations of employees, where the members intend to stop all mail trains as well as other trains, and do delay many, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment. 445 note 7.

20. It is a violation of the federal statutes declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up, though he is willing that the mail car shall go on, and his purpose is other than to retard the mails. 445 note 7.

21. Whether railroad company obliged to detach Pullman cars from mail train when employees refuse to move train unless it does so. 444 notes 5-8.

TAXATION.

1. A New York railroad corporation was authorized to construct its railroad through a portion of Pennsylvania upon certain terms and conditions, which were complied with. Held, that a contract was thereby created between the state and the company which could not be impaired by the imposition of new burdens or conditions by the state beyond reasonable regulations as to the business done and the property owned in Pennsylva-

nia which do not materially interfere with enjoyment of the rights previously granted. 532.

2. An act of Pennsylvania, requiring the company to deduct from the interest payable on bonds held by residents of that state, the tax levied on such bonds, the bonds having been made and being payable in New York, would operate as an impairment of the contract between the company and the state, and is void. 532.

3. The money in the hands of the company in New York is beyond the jurisdiction of Pennsylvania, and the latter state has no power to say how the corporation shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes, or to forbid it to perform its contract with its creditors according to its terms and according to the law of the place of performance. 532.

4. The act of Indiana of March 6, 1891, providing for assessment of railroad property for taxation by a state board, does not fail of due process of law in that it does not require personal notice before the assessments are made final assessments, as the statute names the time and place of meeting of the board; nor in that it does not require the board to grant a hearing for correction of errors, as by the construction of the act by the Supreme Court of the state a right to such hearing is given; nor for want of notice, and the fact that but one hearing before the board is given to railroad companies, while the ordinary taxpayer, whose property is assessed by county officials, after hearing before them, has a right of appeal and a hearing before the state board, is not a denial to the railroad companies of the equal protection of the laws. 348.

5. The provision of the act of Indiana, that rolling stock shall be listed and taxed in the several counties in the proportion that the main track used or operated in such county bears to the length of the main track used or operated by the company, in connection with the requirement of a statement of the amount of capital stock and indebtedness, is not invalid as requiring assessment and valuation of property outside the state. 348.

6. Assessment of railroad track where part of line within state and part without. 348.

7. Where the statute fixes the time and place of the meeting of the state board to assess railroad property, due process of law does not require that the companies should have personal notice before the assessments are made final. 348.

8. Exemptions of railroad property from taxation, their construction and application. 365 note.

9. Modes of assessment and valuation generally. 368 note.

10. Taxation of rolling stock used in interstate commerce. 370 note 8.

11. What included in "railroad track"—Illinois statutes construed. 371 note 6.

12. The act of Ohio, requiring "every corporation or company operating a railroad or any part of a railroad within this state," to pay to the commissioner of railroads and telegraphs a "fee" of one dollar per mile for each mile of track operated by it within this state, contravenes sections 2 and 5 of article 12 of the Constitution of said state, which requires taxes to be levied by a uniform rule upon all real and personal property according to its true value in money. 370 note 5.

13. The law of Vermont imposing a tax upon the entire gross earnings of all railways operated in the state, and providing that if a railway be situated partly within and partly without the state the tax shall be proportionate to the mileage of trains run within the state, is unconstitutional, as an interference with interstate commerce. 370 note 4.

14. In the absence of any statutory provision for compelling railroad companies to pay their state taxes, such taxes may be collected by an action brought by the state. 371 note 7.

15. Under the Constitution of Georgia, which requires taxes to be levied and collected under general laws, the legislature has no power to impose a pecuniary penalty for nonpayment upon the railroads exclusively, leaving all other classes exempt from any penalty whatever. 371 note 7.

16. Nor can the legislature subject railroads to execution for taxes on the first of October when the great mass of the taxpayers are exempt until the twentieth of December. 371 note 7.

17. Terminal property of a railroad company consisting of a freight house,

roadbed and right of way, cannot be sold, under the provisions of a city charter, for nonpayment of assessments thereon for local improvements. 871 note 7.

TELEGRAPH AND TELEPHONE COMPANIES.

See ELECTRICITY; EMINENT DOMAIN, 5-9; INJUNCTION.

1. Where employees of a telegraph company unnecessarily injure trees in the highway, they are guilty of malicious mischief and may be punished accordingly. 687.

2. The simple fact that the landowner did not, at the time the telegraph line was built, although aware of the purpose to build, object and prevent its construction by injunction proceedings, will not estop him, after the expiration of ten years from the date of such construction, from asserting his property interest in the highway and in the trees growing upon and in front of his premises. 687.

3. Where a telephone company, in placing its lines where directed by the city authorities, is obliged to trim certain trees in the street, it is not liable to the owner thereof in damages. 698 note.

TICKET SCALPING.

See CARRIERS, 10-13.

TRUSTS, COMBINES AND MONOPOLIES.

See RAILROADS, 34-36; RESTRAINTS OF TRADE.

1. A contract by which three of four companies in New England, engaged in the manufacture of oleomargarine, consolidate as a corporation, partly for the purpose of stopping the competition between them, and agree that none of them shall separately engage in the business for five years, is not invalid as constituting a monopoly. 184.

2. A combination among a number of brewers of a city to control the price of beer within the city is illegal, as imposing a restraint of trade injurious to the public. 205.

3. Agreements to control prices and prevent competition need not relate to the necessities of life in order to be invalid; it is enough that they relate to

articles of daily consumption or in common use, and beer is of this class. 205.

4. Where an association is formed to enable its members to control the price of a commodity of daily consumption, courts will not lend their aid to a member, or his assignee, who has notice of the nature of the combination, to recover the money due the member under the provisions of the combination. 205.

5. A retail lumber dealers' association, by its by-laws, gave an active member a claim against a wholesaler for selling to a person not a "regular dealer," provided for a hearing of the claim by a committee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. Wholesalers refused to sell to plaintiff because defendant had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims, whereby plaintiff lost a contract. Held, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff. 215.

6. Manufacture and production are not commerce and are consequently not subject to the control of congress within the states, and the fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. 737.

7. Contracts, combinations or conspiracies to control and monopolize domestic enterprise in manufacture and production, and which tend to that result, although they may indirectly affect and restrain interstate and foreign commerce, and although the product may be intended for sale and distribution among the several states, do not fall within the act of congress July 2, 1890, and cannot be directly suppressed thereunder. 737.

8. The purchase of the stock of sugar refining companies for the purpose of acquiring control of the business of refining and selling sugar in the United States, and which results in establishing such control, does not in-

volve monopoly or restraint of interstate or foreign commerce within the meaning of the Federal Anti-Trust Act. 737.

9. Validity of agreements, trusts and combinations to control prices, production or supply, prevent competition or monopolize trade. 212 note.

10. Trade and labor associations — when the objects or acts thereof are unlawful, so as to render the same or the members thereof liable to an action by those damaged thereby. 233 note.

11. Decisions under the Federal Anti-Trust Act. 770 note 2.

12. Of limitations upon individual enterprise in trade and business. 190 note.

13. Whether an individual may purpose to acquire a practical monopoly of any trade or business and enforce contracts made in aid of such purpose. 193 note 4.

14. Individuals and firms engaged in the same business may combine in a partnership, though for the purpose, or with the effect of preventing competition. 194 note 6.

15. Whether the consolidation of individuals and firms may be made, or a partnership formed, for the purpose of securing a practical monopoly of any particular trade or business, and whether contracts in aid of such purpose are valid and enforceable. 194 note 6.

16. Independent dealers and producers, whether individuals, firms or corporations, may combine into a single corporation. 196 note 7.

17. Whether the law sets any limit to the extent to which independent businesses may be consolidated under the ownership and control of a single corporation and beyond which it will not enforce contracts in aid of such consolidation. 197 note 8.

18. Whether the purpose of acquiring the practical monopoly of any trade or business will render void contracts made in pursuance of such purpose. 199 note.

19. Different modes in which a practical monopoly of any trade or business may be acquired or established. 199 note 9.

20. Whether the purchase by one competitor of the business of another will be enforced by the courts when the purchase is made with the intent of buying out all competitors and thus

securing a practical monopoly of the business. 200 note 10.

21. Whether a contract of partnership between two or more competitors will be enforced when made with the intent of bringing in all other competitors, if possible. 200 note 10.

22. Whether a contract of partnership will be enforced, the result being to establish a monopoly. 200 note 10.

23. Validity of contracts made for the purpose of acquiring the practical monopoly of a trade or business by a corporation through the process of absorption and purchase. 202 note 11.

24. Whether the purpose on the part of a corporation to acquire the practical monopoly of any trade or business, renders it an illegal organization or combination. 202 note 11.

VARIANCE.

See CORPORATION, 21.

WAGES.

See RECEIVERS.

WITNESSES.

See INTERSTATE COMMERCE LAW.

1. Constitutional privilege of witness against self-crimination. 508 note.

2. The various constitutional provisions on the subject are made for the same purpose and should receive the same construction. 508 note 1.

3. The constitutional provision protects the witness against making any disclosure that will tend to show his connection with a criminal offense. 508 note 2.

4. If the offense is barred by the Statute of Limitations the witness may be compelled to testify. 509 note 3.

5. So, if the witness has already been convicted or acquitted of the offense, or has been pardoned. 509 note 4.

6. But a witness cannot be compelled to testify because of a statutory provision that his testimony shall not be used against him. 509 note 5.

7. A witness may be compelled to testify where he is afforded by statute complete immunity as to any offense disclosed by his evidence. 509 note 6.

8. The constitutional provision does not protect the witness from making disclosures that merely tend to involve him in disgrace and ignominy. 512 note 8.

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